

AN ENQUIRY INTO THE HISTORY OF REGISTRATION

FOR PUBLICATION IN SCOTLAND

being

A Thesis for the Degree of Ph.D.
of the University of Edinburgh

by

LEWIS OCKRENT,

B.L.

October 1937.



C O N T E N T S.

	<u>Page</u>
Introduction	1

PART I.

HOW REGISTRATION OF RIGHTS TO LAND AROSE IN OTHER COUNTRIES.

CHAPTER 1.

Observations on Origins of Registration of Land Rights.

Section I. Owners	2
" II. Lenders	4
" III. Political and Economic Factors Promoting Growth of Registra- tion in Europe	7
" IV. Fiscal Policy as a Factor in Registration	17
" V. Beginnings of National Registers in Europe	22

CHAPTER 2.

Observations on the Land Registers of England and Ireland.

England.

Section I. Saxon Period	28
" II. Era of Secret Conveyancing	30
" III. Copyholds	37
" IV. Early Agitation for the Intro- duction of Land Registers	42
" V. Institution of Land Registers	45
" VI. Registers of the Isle of Man	61

Ireland.

Introductory	64
Section I. Registration of Assurances	65
" II. Registration of Title	71

PART II.

FEUDAL REGISTERS OF SCOTLAND.

PageCHAPTER 1.

Factors which influenced the Introduction
of the Feudal Registers.

Introductory	...	...	...	...	80
Section I. Judicial Factors	...	...	...	...	81
" II. Political and Economic Factors					86

CHAPTER 2.

Notarial System and Legislation on Registration
Prior to the Act of 1617.

Section I. Notarial System	...	...	...	100
" II. Legislation on Registration Prior to the Act of 1617	...	...	...	117

CHAPTER 3.

Legislation on Registration of Feudal Deeds
in the 17th Century, and its Interpretation
by the Court.

Section I. Registrable Matter	...	...	...	131
" II. Time Limit for Registration	...	...	...	139
" III. Places of Registration	.	...	...	141
" IV. Booking of Sasines	...	...	...	144
" V. Certificate of Registration	...	...	...	152
" VI. Effects of Registration	...	...	...	155
" VII. Effect of Non-Registration	...	...	...	161
" VIII. Minute Book	...	...	...	174

CHAPTER 4.

Rationalisation of the Practice of Registration
in the 19th and 20th Centuries.

Section I. Key to the Registers	...	...	...	195
" II. Objectives of the Conveyancing Reformers	...	...	...	201

	<u>Page</u>
Section III. Statutory Conveyancing in Relation to the Registers ...	207
" IV. Land Registers Act of 1868 .	249
" V. Latest Changes and Improvements in the Process of Registration	263

PART III.

LAND RIGHTS ASSIMILATED BY THE FEUDAL REGISTERS.

Introductory	292
---------------------	-----

CHAPTER 1.

Origin, Development and Discontinuance of the Burgh Registers.

Section I. Early Origin of Burgh Registers	295
" II. Burgh Registers prior to the Act of 1681, c.11	314
" III. Statutory Institution of the Burgh Registers	324
" IV. Inter-relation of the Feudal Registers and the Burgh Registers	326
" V. Assimilation of Forms of Burgage Conveyancing to those in use for Feu Holdings, as leading to Discontinuance of the Burgage Registers	332
" VI. Discontinuance of the Burgh Registers	343

CHAPTER 2.

Registration of Leaseholds	350
-----------------------------------	-----

CHAPTER 3.

Real Burdens	365
---------------------	-----

AN ENQUIRY INTO THE HISTORY OF REGISTRATION
FOR PUBLICATION IN SCOTLAND.

INTRODUCTION.

Under the above title we comprehend an enquiry dealing with the land registers only, to which the nomen juris "Registration for Publication" is technically applied.

The first part of this work is devoted to a review of the factors, particularly those of a political, economic and social character, which have played their part in the process of the evolution of the various land registers of Europe and the British Isles, excluding Scotland.

Though, on a strict interpretation, this may not fall within the scope of our enquiry, nevertheless we regard this preliminary survey as of some importance if the comparative standpoint is not to be ignored; furthermore, we trust that, as a result of widening our perspective, Scotland's claim of having made a distinctive contribution in this special branch of jurisprudence will be fully substantiated.

P A R T I.

HOW REGISTRATION OF RIGHTS TO LAND AROSE
IN OTHER COUNTRIES.

CHAPTER I.

OBSERVATIONS ON ORIGINS OF REGISTRATION
OF LAND RIGHTS.

Section I. OWNERS.

The first question that leaps to the mind in a study of origins in our subject is:- What rights of property must obtain in any given state of society before any system of registration of land rights can be envisaged? Obviously, the state of society must be one in which the right of its individual members to hold property in land in fee simple ownership is recognised and protected. This is a primary requisite.

As a primitive community passes, through the agency of war and the spread of a knowledge of agriculture, from the stage of communal ownership or village organisation to one in which a clearly

defined area of ground is possessed by an individual, free in his person and in his power of action over such territory, we approach the period when publication of ownership, in some form or other, becomes a pressing need and, with few exceptions, an ultimate reality. Thus a paradoxical situation arises, inasmuch as, in a developed state of society, private property in land becomes more and more dependent on an ever increasing form of efficient public notice for its recognition and security.

By private property in land we clearly mean that degree of ownership which the term connotes to-day. The right to own or till ground for a limited period, or a right depending on the whim and caprice of another, could not create an environment wherein the temporary occupier of the ground would feel the need or the desire for public recognition of his right; nor, on the other hand, would a state of society, where such primitive property relationships existed, provide the machinery or a forum for that purpose. When, however, grants under the feudal system evolved from the foetal beginnings of "munera" to "beneficia", and finally to "feuda", the situation was entirely altered, and it was only natural that the vassal should then seek protection for his acquisition by publicity in some form or another.

In most countries, and for a long period of time, this publicity was obtained by the vassal doing homage at the court of his superior in the presence of his co-vassals. In Saxon England, transactions received the publicity of the Shire-mote, and in Denmark attendance at the tribunal (ting) was, until the introduction of registration, the sole ceremony in the transfer of land.⁽¹⁾ Brittany gives us perhaps the most curious example of all. There a very peculiar custom existed called "appropriance", which consisted of proclamations by "banns" on three successive Sundays in church.⁽²⁾

Publication conceived in the interests of third parties was a matter of much later growth, consonant with the spirit of an age which regarded land as a commercial commodity, and the personal status bound up with its ownership as a matter of less consequence.

Section II. LENDERS.

Two far-reaching results of the substitution of money payment for personal services as "reddenda" to superiors, consequent on the gradual transformation

(1) C. P. Cooper, Notes respecting Registration, p.57.

(2) Sir Charles Fortescue-Brickdale, Methods of Land Transfer, p.119.

of feudalism, were that land became a fund for credit, and that legislation governing the transfer of land became a subject of transcendent importance to the commercial and money-lending classes of the Middle Ages. These groups would feel even more need for adequate safeguards for the monies which they had advanced on the security of land than would suffice to protect the grants of proprietary holders. But credit transactions in land were clogged with considerable difficulties. In its activities the merchant class had to contend with the antagonism of the Church. "The merchant," says a text attributed to St. Jerome, "can please God only with difficulty."⁽¹⁾ The thunders of the clergy against usury had also to be reckoned with.

These impediments, however, proved no barrier to the progress of commerce. Moreover, the attitude of the Popes to the merchant class in 13th century Italy shows that the Church was not averse to taking advantage of the monetary gains to be derived from permitting a relaxing of their doctrines. In any event the doctrines of the Church relating to this phase of human activity were bound to fail because their universal adoption would have spelt ruin to

(1) Henri Pirenne, *Medieval Cities*, pp.128-9.

all human progress and would have resulted in the penetration of asceticism into the material life of Europe. Meanwhile, in order to evade the laws of the Church, credit adapted itself to the needs of commerce by the invention of mortgages under the guise of out-and-out sales.

The advent of Protestantism, which on its secular side depended to a great extent on the support of a rising commercial class opposed to the demesniai organisation of society, brought to light a new attitude to the interest factor in credit transactions; and although Melancthon and others stuck to the old view, Calvin, with characteristic boldness, maintained that "usury was usury only when it was oppressive to the poor".⁽¹⁾ In England money-lending was permitted by law under Henry VIII. Towards the end of the 17th century even Catholic theologians changed their views on this subject.⁽²⁾

The emancipation of money, if one may use such a term, following on the spread of utilitarian ideas, and its increased tendency to accumulate, had an important bearing on the demand for improved means of safeguarding the rights of money secured over land, and was undoubtedly a primary agent in the development

(1) G. N. Clark, the 17th Century, pp.19-20.

(2) Ibid.

of registration in Europe. The anxiety of lenders to discover a form of security which would be subject to none of the ordinary risks attending proprietary rights in land, caused by defects in title or frauds on the part of owners, explains the widespread introduction of mortgage registers in many countries on the Continent. These, in many cases, were established prior to the granting of the like facilities in the case of transfer of land by irredeemable conveyance. Such registers are met with in many parts of the German and former Austrian Empire, and reference may also be made to the Forordnung of Christian III. of Denmark in the year 1553⁽¹⁾, as well as to a mortgage enactment in France in the year 1673.⁽²⁾

Section III. POLITICAL AND ECONOMIC FACTORS PROMOTING GROWTH OF REGISTRATION IN EUROPE.

In view of the fact that registration of land rights became feasible when land was held in unqualified ownership and became available as a fund for credit, it is quite in the order of things that the

(1) Cooper, op. cit., p.58.

(2) Ibid, p.33.

property of those groups in feudal society which answered to these conditions should be the first to be affected by the process of registration. The property in question pertained to the higher nobility and to the members of burghal communities.

(a) Higher Nobility. For reasons into which we cannot enter here, the section of the nobility which stood high in the ranks of the feudal organisation of society enjoyed grants of land on easy terms, comparatively free from the vexatious dues and services which were imposed on those below. Land thus virtually unencumbered must have been the occasion of not infrequent acquisition. To this cause we can probably ascribe the existence of a register in Prague, called the Austrian Land Tafel, which dealt with the property of the nobles of Bohemia, and which is stated to go as far back as the 12th century at least.⁽¹⁾

Although the higher nobility were liberally endowed with land, they had no moveable estate. The demesnial economy, founded as it was on production for consumption and not for export, prevented the feudal barons from acquiring ready money out of their

(1) Report on the systems of Registration of Title in Germany and Austria, 1896, p.49.

own resources.

As a class they were averse to trade and thought it beneath their notice. As Pirenne puts it, "save "in Italy where aristocratic families did not hesitate to augment their incomes by having an interest "in commercial operations in the capacity of money "lender, the prejudice that it was degrading to be "engaged in business remained deep-rooted in the "heart of the feudal caste up to the time of the "French Revolution."⁽¹⁾

Whenever that class required money for extraordinary occasions, such as the purchase of luxuries which came from the East, or for equipment of the contingents which they furnished in the cause of war, they were thrown into the arms of bourgeois entrepreneurs, recruited from the wealthy townsmen who identified the profession of money-lending with that of merchant contractor.

The succeeding centuries served to accentuate the growing economic supremacy of the urban capitalist class over the seignorial aristocracy, and frequent crises in the affairs of the latter at last convinced them that without liquid capital they were doomed to extinction in a changing world, but with it they could participate in the great opportunities

(1) Pirenne, pp.128-9.

offered up by the new era. Therefore, they made their bargain with their more enterprising social inferiors, who in turn demanded adequate security for the monies they were to lend to a class which they honoured but did not trust.

There are many instances on record evidencing the concern of the monarchy for the financial stability of the nobility, whose well-being they regarded as essential for dynastic reasons and in whose interests they promoted the establishment of registers, particularly those of a mortgage type, in the hope that they would be able to obtain loans on more advantageous terms against the consideration offered to lenders in the shape of greater security for their loans. To this cause we can trace the origin of many pioneering efforts in the establishment of registers.

The Austrian Land Tafel has been already referred to. Alienations and mortgages by Danish nobles were, by a Forordnung of Christian IV. in the year 1622, appointed to be registered at the first or second Landsting of the province where they were dated.⁽¹⁾ This was the second earliest edict on registration in Denmark, the first one affording the same facilities to conveyances of land in burgh only. It appears that

(1) Cooper, op. cit., p.59.

about the year 1674 it was recommended to the King of France that he establish a mortgage register as the only effectual means of establishing the lost credit of his impoverished nobility. This project was not, however, carried out.⁽¹⁾ At the date in question the only deeds which were capable of registration under statute were Donations under an Ordinance of the year 1539.⁽²⁾ To conclude, we find an edict in force in Bavaria under which mortgages by nobles were registered in a special book, called "Matrikel", founded upon principles of specialty and publicity which by removing the former risks attending credit transactions enabled the nobles to borrow money on a reasonable rate of interest.⁽³⁾ This latter edict was in full swing before the celebrated "Hypotheken Gesetz" of Maximilian Joseph of 1825, which conferred a similar boon on the bulk of the nation.

(b) Burghers. Notwithstanding the early appearance of the Austrian Land Tafel, we venture to surmise that it is to the reforming spirit of the burghers of Europe of the Middle Ages that we owe the innovation or, at least, the entrenchment of Registers.

(1) Cooper, op. cit., p.36.

(2) Ibid, p.20.

(3) Ibid, p.167.

By the time the 12th century had run its course a definite break in the traditional order of society had taken place and the beginnings of a new phase in the economic life of Europe had gained a firm foothold. The products of the soil were no longer universally ingathered into the demesne storehouse and used for local consumption, but "were brought into general consumption as objects of barter or as raw material".⁽¹⁾ This revolutionary change, initiated about this period, proceeded apace throughout the succeeding centuries, varying in tempo according to national or geographical circumstances. It did not come from within the demesne organisation, but was more or less forced upon it by the rise of the burgher class.

In some countries this fundamental departure took place by peaceful means, even by the connivance and with the encouragement of the ruling powers. In Scotland, for example, under the wise and far-seeing policy of David I., the welfare of the burghers became his especial care and he encouraged them in their activities. William I. also signalised his reign by the grant of charters to the royal burghs, in which their rights to important privileges of trade and craft monopolies over wide areas were confirmed.

(1) Pirenne, op. cit., p.104.

In England, the rise and development of burghs followed pretty much the same course. Wherever it was to the advantage of a Lord Paramount, towns in England were taken under his wing and those privileges which were most valued in the Middle Ages, namely, the right to rent tolls, to hold regular fairs and markets, and to purchase land freely, were conferred upon them.⁽¹⁾ On the Continent, however, the political and economic emancipation of the townsfolk was, in many places, ushered in to the accompaniment of violence and social conflict, partaking in many places of the nature of class war.⁽²⁾ In Lombardy and Tuscany the townsmen gained their freedom and urban privileges only after sanguinary struggles with their overlords in the first decade of the 12th century. The same issue was fought out by the townsmen in France, Flanders, the Rhine district and other parts of Europe, where victory was achieved by the same means in the same period. When a balance was struck it was found that the result presented a far from uniform character

(1) F. H. B. Oldfield: An entire and complete History, Political and Personal, of the Boroughs of Great Britain, 1792, Vol.I., p.114.

(2) P. Boissonade: Life and Work in Mediaeval Europe, 5th to 15th Century, p.195 et seq.

and the degree of independence won in all places was far from being the same. In France - apart from the North and South - Southern Italy, Spain and Germany, the townsmen were obliged to recognise the sovereignty of a suzerain, under the control of officials appointed by that power; but in Northern and Central Italy, the South and North of France and in the Low Countries as early as the 12th century, and in the Rhine and Danube lands of Germany from the 13th century, there appeared quasi-sovereign states, or freetowns, which attained a higher degree of power.

Although complete independence was not achieved by all the burghers of Europe, the gains they shared in common were freedom of the person, and a tenure of land freed from the irksome fetters of feudalism. Both went hand-in-hand, whether a burgh won its independence as a result of social conflict or received it from the hands of an overlord as an act of grant. This was so in Scotland; and in England Burgage Tenure was a freer tenure than Soccage, since it could be sold, bequeathed and divided. Says Glanvill, "Burgage Tenure may be defined as a form of "tenure, peculiar to boroughs, where a tenement so "held might be alienated by gift, sale or devise to "a degree regulated only by the custom of the borough, "unencumbered of the incidents of feudalism and

"villeinage, devisable at pleasure, whose obligation
 "began and ended with the payment of a nominal quit-
 "rent, usually to an elected officer of the burgh."⁽¹⁾

In Ghent and some other continental cities, a slight link with their feudal past was retained, since the ownership of the soil remained with the lord;⁽²⁾ but as full freedom of sale, devise and mortgage was vested in the owner of the building, the general proposition holds here also. In Germany we find almost all the features of burgage tenure in England, shot through with the heterogeneity of German institutions.⁽³⁾

But freedom of status and freedom of tenure cut right against feudal polity. The demands of the townsmen for freer forms of life, patterned on more variable and flexible institutions, which would facilitate and not thwart their commercial and industrial enterprises, could not be met within the framework of feudal society; so the only solution was the creation of an imperium in imperio where the burgher could institute his own "town peace", set up his own tribunals, and make such laws for the transfer of property as

(1) Quoted from Article on Burgage Tenure by H. De W. Hemmeon in Law Quarterly Review, year 1910, p.215.

(2) Ibid, year 1911, p.54.

(3) Ibid, pp.55-6.

were suited to the requirements of a class which looked upon mobility of property as a blessing and not an evil. The "Leges Burgorum" of Scotland, adopted first in the four Southern burghs, were mutatis mutandis a replica of similar burgal constitutions of other towns of Europe.

In this environment, if anywhere, the root-plant of registration must have found a congenial soil, and although it is apparent that not in all countries did the townsmen employ registration as an instrument in the completion of title to land, yet there is enough evidence to justify our statement.

In the 13th century, we are informed, all alienations were entered in public registers in Cologne, Hamburg, Magdeburg and other cities, these registers subsequently serving the purpose of inscription of mortgages.⁽¹⁾ Registers are also said to have existed from time immemorial in many of the principal cities of the German and former Austrian Empires. Vienna, Prague and Munich are cited as having registers dating respectively from 1368, 1377 and 1440.⁽²⁾ To these must be added the Hanseatic towns of Lubeck and Bremen, which also possessed registers of very

(1) Cooper, op. cit., p.56.

(2) Report of 1896 on Registration of Title, supra p.7.

ancient date.⁽¹⁾ Then there was the register, already referred to, for the registration of alienations and mortgages of property in market towns, instituted in Denmark in 1553.⁽²⁾ In conclusion we have the example of our own Burgh Registers, whose existence was evidently held as a reason for the exemption of burgh property from the operation of the Act of 1617 which inaugurated the feudal registers.

Section IV. FISCAL POLICY AS A FACTOR IN REGISTRATION.

We have discussed the decay of the virgin strength of feudalism as a result of its contact with money. Nowhere was the lack of money felt more severely during its reign than it was at the very apex of the pyramid, namely, the Royal Household.

One of the inevitable shortcomings of feudal society was the lack of a general system of taxation graduated according to the wealth of its members. In an emergency, such as the outbreak of war, it was frequently driven to raise money by mass levies of a

(1) Report of 1896 on Registration of Title, *supra* p.49.

(2) Cooper, *op. cit.*, p.58.

highly casual and repressive character. Stocks and shares, and all these other symbols of accumulated movable wealth associated with modern capitalist development, were not within its reach, so it frequently fell upon the device of extracting taxes from the chief source of wealth and investment to hand, which was of course, land. Not uncommonly, owners of land supplied the wherewithal, but if that source failed or did not suffice, the Exchequer tapped the resources of the creditor classes by levying taxes, in some cases as high as 10% of the principal, if not higher, on the sums involved in mortgage transactions. We have to thank this budgetary device for evidence of the early relation between fiscal policy and registration of mortgages, which was established in different states and principalities.

This method of extracting money by the various Exchequers of Europe fell most heavily upon the Jews. After a long and chequered career in Europe, and after being forced, as a result of pressure from the burgher class, to divorce themselves from their functions as the finest craftsmen of the early Middle Ages, they were finally classed as "Regale", and, as the price of protection and right of residence, were forced to engage in occupations which would enable them to meet the ever-increasing demands of their rapacious suzerains.

Thus an inevitable process led them into the profession of moneylending, consequent upon which they became an essential link in the scheme of treasury exploitation and taxation.

This chain of circumstances accounts for the phenomenal association of Jews with the establishment of an abnormal type of land register, called "Fiscal Registers".

So far as England is concerned, under the benevolent policy adopted towards them in the 11th century, Jews were chiefly engaged in agriculture or trade, but with the advent of the Norman kings their activities plainly bear the stamp of Treasury serfdom and their economic life was almost entirely diverted into the channels of credit transactions. It is safe to assert that in no other country were the Jews so completely fettered to treasury policy. In pursuance of the policy of the English treasury, several decrees were passed in the 12th century, all with the object of ascertaining the amount of the credit transactions of the Jews, and safeguarding the source, namely the Jewish population, from which the fisc obtained the enormous amount of one thirteenth part of the total revenue of the crown. The decree that interests us, however, was the one of Richard the Lion Heart in 1194, setting up Jewish registers called

"Saccarium Judaeorum", for the booking of mortgages. These were instituted in six or seven towns, to which the right of residence of Jews was restricted. Afterwards the number of registers was extended by 20.⁽¹⁾

A belief has been entertained that these Jewish registers might or ought to have served as a spring-board to a national register in England. To quote Walter Ross, - "It is a matter of great surprise that "registers were not thenceforth (i.e. after the introduction of the Jewish Registers) established in "England."⁽²⁾

We confess to seeing no strong reasons for supporting this contention. On the contrary, these registers, for obvious reasons, must have been obnoxious to both mortgagor and mortgagee, and were likely to raise an animus against the current conception of registration amongst that small body of the population who might possibly have been affected by its extension.

Analogous Jewish registers, motivated by the same aims, were established in France in the first decade of the 13th century,⁽³⁾ and in Germany and

(1) Dr I. Shipper, Economic History of the Jews (Yiddish), Vol.I., pp.75-77.

(2) Walter Ross's Lectures; Vol.I., pp.92-3.

(3) Dr Shipper, op. cit., Vol.I., pp.98-9.

Austria towards the end of the 14th and the beginning of the 15th century.⁽¹⁾ Poland also yields evidence of the existence of such registers, but on a restricted scale, at the end of the 14th and the beginning of the 15th century.⁽²⁾

We have dealt at some length with this subject in order to emphasise the early appearance of a type of register, the inner meaning of which is often lost sight of. Moreover, their study throws a side-light on the motives which subsequently led to the introduction of non-racial fiscal registers. It is stated that in France, prior to the Revolution, various edicts at different periods required almost every transaction relative to property to be registered in order to ensure the payment of Government duties, but such ceremony was a mere "extrinsic form, the omission of which was punishable by fine but which did not invalidate the instruments".⁽³⁾ The Cadasters or land tax registers of Germany, particularly those of the Rhine districts, where general registration has only been a matter of comparatively recent growth, were projects devised for shewing who were the owners

(1) Dr Shipper, op. cit., Vol.III., pp.45-46 and 170.

(2) Ibid. p.240.

(3) Cooper, op. cit., p.18.

liable to land tax.⁽¹⁾ Almost in our own days, Belgium, under its law of December 16th, 1852, furnishes us with a more up-to-date example of the convergence of fiscal policy with land registration.⁽²⁾ Coming nearer home, our early registration acts of 1503 and 1540 were primarily "regulations made for the collection of Crown Revenue", and one may add that at a Sederunt of the Privy Council held on 30th August, 1625, it was ordained that Clerks of Registers of Sasines be instructed to deliver a note of all contracts and securities registered in their books for money borrowed or lent from the year 1619.⁽³⁾

Section V. BEGINNINGS OF NATIONAL REGISTERS IN EUROPE.

The registers we have hitherto discussed were definitely not of a national type. However much they diverged in form and in their manner of introduction, one purpose was common to all of them - they were intended to function in the interests of a

(1) Report on Registration of Title, *supra*, p.57.

(2) Cobden Club: Emile De Laveleye, Essay on the Land System of Belgium and Holland, p.269 et seq.

(3) Register of the Privy Council, Vol.I., 2nd Series, pp.124-5.

particular class or group. National registers were a matter of much later growth.

The establishment of National registers presupposes the existence of certain preliminary essentials, among which may be reckoned a thoroughly organised centralised state, competent judicial machinery, and a population whose laymen had reached the stage of literacy, where instrumentary conveyancing became practicable. These essentials were, broadly speaking, either lacking or not found in combination in the era of the special or local registers above alluded to.

As the knowledge of the written word spread, the consciousness of the superiority of a system of preserving evidence of grants in the form of written deeds over the unsatisfactory method of relying on memory and the testimony of witnesses, impressed itself on the various peoples of Europe. But old prejudices die hard, and even when written conveyances were firmly established in the saddle, anxiety as to the safety of the new method lingered on for a considerable period. Many of our older sasines portray this feeling by the adhibition of multifarious signatures of notaries and witnesses. In Denmark written conveyances were first adopted in the 13th century by the sovereign and the clergy, and became

more general in that country in the 14th century; but even as late as the beginning of the 16th century, verbal transactions before the Court tribunals were occasionally practised.⁽¹⁾ By the end of the 16th century, however, instrumentary transfers were the order of the day almost everywhere, England, where "livery of Sasine" could be taken without any writing at all, being an exception. Signed writing in England was first made an essential only by the Statute of Frauds in 1677, a fact which accounts for one of the difficulties of introducing registration in that country - a difficulty by which Scotland was not hampered.

Unfortunately, instrumentary dealing with land brought its dangers at a time when mankind was emerging from a period of human history which was not exactly a training camp for the higher virtues, and frauds became sufficiently widespread to outbalance the gain derived from written deeds. Out of evil, nevertheless, came good, and frauds brought registration into the limelight in some countries where the time lag might have operated. In the preambles to our early acts on registration, great complaint is made of the ruin which had overtaken many of the

(1) Cooper, op. cit., p.58.

lieges on account of frauds in deeds relating to transfer of land, although it may be some comfort to us to know that this failing was not a monopoly of Scotsmen of the 16th and 17th centuries. The preambles to the registration acts of 1553 of both France and Denmark narrate that the elimination of frauds is their desideratum.

The prevalence of frauds, however important, was not the sole agency which prompted statesmen to busy themselves with the conception of national registers, of which tentative beginnings are first seen in the 16th century in France, Denmark and Scotland. The economic factor looms up once more. As we have elsewhere hinted, from and after the end of the 16th century, capitalist notions, embryonic in scope and character, pervaded the minds of men in all European countries, and newly consolidated monarchical states, responsive to the spirit of the times, re-organised the machinery of the state and provided an administrative and juridical basis for the development of agriculture and commerce. In the words of one writer, "The work of monarchy in the 17th century may be described as the substitution of a simpler and more unified form of government for the complexities of feudalism..... On one side it was centralisation, the bringing of local business under the supervision

"or control of the government of the capital...."(1)

The inauguration of registration on a national scale was a task natural to a centralised government, nevertheless a considerable period elapsed before this was put into universal practice.

Apart from Scotland and evidently Denmark, as a result of piecemeal legislation, commencing in 1551 and ending in 1683, it would appear no other country in Europe could boast of having complete national registers in the 17th century. It is to be noted, however, that in France, by an ordinance of the year 1539, a register was provided for the "insinuation" of "donations", and by another ordinance issued 15 years later, a register was inaugurated for the "insinuation" of "substitutions", which comprised sales, exchanges, donations, devises and mortgages; but this latter edict "does not appear to have been carried into operation"; and finally, an edict, revoked in the following year, was passed in the year 1673 for the introduction of a Mortgage Register. Fresh proposals in the reign of Louis XV., intended to revive the purpose of the edict of 1673, came to naught. We have to wait until the Revolution before national registration covering the whole country was finally

(1) G. N. Clark, *supra*, p.91.

established in France.⁽¹⁾

A long hiatus followed until we light upon the establishment of National Mortgage Registers in other countries; e.g. in Austria in the year 1758,⁽²⁾ followed by Prussia in 1783⁽³⁾ and by Bavaria in 1825⁽⁴⁾. The fact that uniform national registration in these latter countries was at first developed in the narrower sphere of security writs, reveals the interesting feature exhibited in other countries as well, that legislators in the 18th and early part of the 19th centuries had the security of lenders primarily in view, and that they perceived in registration a medium for the provision of credit on a reasonable rate of interest for commerce and agriculture.

(1) Cooper, op. cit., p.20 et seq.

(2) Ibid. p.147.

(3) Ibid. pp.156-7.

(4) Ibid. p.167.

CHAPTER 2.OBSERVATIONS ON THE LAND REGISTERS
OF ENGLAND AND IRELAND.ENGLAND.Section I. SAXON PERIOD.

One cannot say that complete unanimity prevails among English writers as to the extent to which feudal doctrines pervaded the tenure of land in Saxon England, but it would seem quite clear that, tested by the criterion of land freedom - right of alienation, power of devise and transmission by inheritance - the freemen of pre-Norman England had full proprietary power over their holdings of boc-land.⁽¹⁾

In Saxon England, land was the hall-mark of status and the basis of civil rank, and therefore the exact definition of the size of a man's holding and the validity of his title thereto was naturally, even in those times, a subject of anxious enquiry.

Although the form of land transfer was based on very elementary principles, yet in harmony with what

(1) Sir Frederick Pollock and Frederick William Maitland: History of English Law, Vol.I., pp.37-40.

might almost be termed a psychological law, its efficacy was secured by publicity.

"Before the Conquest," says one writer, "grants of land were enrolled in the Shire book after proclamation made in the Shire-mote for anybody to come in that could claim the land conveyed, and this was as irresistible as the modern Fine with proclamations or Recovery."⁽¹⁾ According to another writer, "The old Saxon custom was to transact all conveyances at the Shire-mote and enter a memorial of them in the chartulary or ledger book of some adjacent church or monastery."⁽²⁾ On the other hand Mr Flintoff gave it as his opinion "that the transactions of the Shire-mote were not committed to writing, but were trusted to the remembrance of Witan and judges, except in the case of transfer of land when the land-boc or charter was the proper evidence, although oral testimony was not excluded".⁽³⁾

Whatever the exact state of affairs may have been, one thing was certain - publicity was an

(1) C. Wren Hoskyns: Essay on Land Laws of England, pp.99-100. Cobden Club, Systems of Land Tenure, 1870.

(2) Article on the Registration of Assurances Bill of 1850. Law Magazine, Vol.XV. new series, p.4.

(3) Owen Flintoff: Rise and Progress of Laws of England, 1840, p.92.

indispensable element in the transfer of land in Saxon England, although we are inclined to think that legitimate doubt hangs over the question whether registration of the contents or purport of deeds was then an essential proceeding.

Section II. ERA OF SECRET CONVEYANCING.

Consequent on the rigid feudal organisation set up by the Normans, the underlying aim of which was to make the monarch the direct superior of every land-owner in the kingdom, Saxon land law decayed, and the ancient feudal method of transfer by giving corporal seisin on the land, with or without charter of feoffment - known in England as "livery of seisin" - took the place of the earlier Saxon custom of publicity at the Shire-mote.

"Livery of seisin" as a mode of transferring land differed in no essential respect from the practice adopted in most feudal countries before written deeds were the vogue, and had England taken the path, normally trodden by other countries, of constant adaptation of feudal theory to changing circumstances instead of pursuing a course singularly characteristic of herself, her theory and practice of conveyancing

would have presented no special features of difficulty and complexity, and the remarkable isolation of England from the comity of registration countries would not have come about.

For this untoward development we have to thank the constant struggle waged by English ecclesiastics and lawyers against the exactions imposed by the feudal system and the statutory hindrances to the mobility of land. In the course of this struggle English lawyers displayed an ingenuity and subtlety which has been unparalleled in any other country, and the final results of their labours, so far as publicity in land transfer was concerned, were that the original ceremony of infeftment practically disappeared and that a body of law took shape which buttressed the system of secret conveyancing, from which only Copyhold Estates were free.

Secret Conveyancing was a natural emergence from the English doctrine of law which admitted that land was capable of being split up into two estates, the "legal" and the "equitable", each of which fell to be regulated by different principles, having their own separate forum for reference, in the one case the ordinary Courts of Law and in the other the Court of Chancery. This distinction compares with the distinction between dominium ex jure Quiritium and in

bonis habere which existed in Roman Law prior to Justinian⁽¹⁾ "and in each case the distinction originated in the desire to evade the technicalities and hardships of the older common law".⁽²⁾

The greatest hardships of the older common law in England were, so far as our subject matter is concerned, a liability to forfeiture and incapacity to devise. It was in order to prevent the monastic houses from cheating superiors of their feudal dues that the Mortmain Laws were passed. Faced with these laws, according to Coke, Church lawyers set themselves the task of inventing a form of transfer which would pass the beneficial interest of the land freed from feudal restrictions.⁽³⁾ They found the means of attaining their desire, through the aid of the Court of Chancery which was manned by ecclesiastics.⁽⁴⁾ It consisted of the simple device of a form of transfer which conveyed the "Use", ignoring the "legal estate" which retained only a nominal value. By conveying

(1) Lord Mackenzie: Studies in Roman Law, pp.171-2.

(2) W. H. Upjohn: Article on the Statute of Uses and the present system of Conveyancing: Law Magazine and Review, Vol.VI. 4th series, p.134.

(3) H. A. Hayward: Historical Sketch of the Law of Real Property in England: Juridical Tracts, p.19.

(4) J. W. Brodie Innes: Article on some outstanding differences between English and Scots Law: Jur. Review, Vol.27, 1915, pp.39-40.

the land to "Use" the beneficial ownership of the land was acquired, and the legal estate was vested in a number of persons, thereby diminishing the occasions when a claim for feudal dues could arise. But it is important to remember that although the original purpose behind the invention of "Uses" was to obtain solid material advantages, indirectly it was the cause of transforming the law and practice relating to the acquisition of land generally, as will appear below.

A conveyance to "Use" was governed by principles of equity, and not by the principles of the common law. Not being a conveyance at common law, feoffment with its attendant publicity was ruled out, this mode of transfer being only applicable to a conveyance of the "legal estate" as prescribed by the common law.

The period of the Wars of the Roses, when many landholders were faced with the danger of losing their lands on account of treason or felony, stimulated the growth of the practice of conveying to "Uses", so much so that in the 15th century the greater part of the land in the kingdom was held in use.⁽¹⁾ Arising out of these circumstances we find that prior to the

(1) W. H. Upjohn, Art. cit., p.136.

reign of Henry VIII. the usual method of effecting a purchase of land was by means of a contract called "bargain and sale", by which the vendor retained the legal estate and the purchaser was seised in the "Use". Under this type of contract the purchaser had a right to sue for a formal conveyance in the Court of Equity. This mode of dealing could be effected by word of mouth alone, and required no livery of seisin, i.e. no publicity.

The abuse of "Uses" played havoc with the revenues of superiors and it brought other evils in its train. The separation of the legal estate from the equitable estate provided a fertile means for defrauding creditors and purchasers, and a situation thus arose when the reform of the law became the concern of all.

Several Acts were passed in the reign of various monarchs, particularly in the reigns of Richard II. and Henry VII., to curb the evil, but they all failed of their purpose as is borne out in the recital to the famous statute passed in the reign of Henry VIII. This last mentioned statute, known as the "Statute of Uses", made a determined effort to grapple with the problem once and for all. The framers of the Act hit upon the happy idea of establishing the legal estate in the cestuiqui use by annexing the legal

estate to the "Use". This manoeuvre was defeated by the construction which common law lawyers placed on the Act, but an even more decisive blow was given to the Act by the celebrated case of Tyrell, which decided that the equitable estate still remained separated from the legal estate where a "Use" had been declared upon a "Use".

It ought to be pointed out that there was nothing in the "Statute of Uses" to prevent the creation of a "Conveyance to Use" in the same manner as was done before the Act. "Uses", therefore, which were so created carried the legal estate with them. From this consideration it followed that "Uses" which were thenceforth constituted by a "Bargain and Sale" would draw the legal estates after them, whilst also destroying the last remnant of publicity.

That this eventuality was foreseen is evidenced by the passing of an Act ("Statute of Enrolments") in the same year which witnessed the passing of the "Statute of Uses". This Act endeavoured to put back the clock and would, had it been successful, have marked a return to the old usage of publicity. Under its provisions contracts of "Bargain and Sale" of freehold interests in land, which by the "Statute of Uses" had been converted into conveyances, were in future only to be valid if made by deed indented and enrolled within six months

of their date in one of the Courts of Record at Westminster, or with the Clerk of Peace for the Courts in which the lands lay. This Act took the place of a draft Bill, which, if it had become law, would have established a General Registry for all deeds affecting land.⁽¹⁾ Unfortunately, even in this restricted form, the Act became a dead letter for the following reasons. Bargains and Sales for terms were not included in the Act, and about 60 years after its introduction an ingenious lawyer discovered that all manner of publicity could with safety be ignored provided the following steps were taken. Firstly, by the raising of a "Use" for a year, the ex facie lessee would have a vested estate under the 'Statute of Uses' without livery of seisin or enrolment; and secondly, by the ex facie lessor granting a deed of release of the reversion to the lessee - livery of seisin in this case also was not required, as the grantee was already in legal possession. After some initial doubts this device was fully vindicated and the transfer of freehold estate continued to be carried out by Lease and Release until the Act of 1841 (8 and 9 Vict. c.106) brought about the same result by a single deed.⁽²⁾ One outcome, therefore, of the

(1) W. S. Houldsworth: History of English Law, Vol. IV., pp.457-8.

(2) A. Hayward: Art. cit., pp.31-32.

Statute of Uses was "that the old common law system, "the characteristic of which was notoriety, had been "entirely superseded, instead of continuing to co-exist with the new."

Scots conveyancers, who have been brought up in a different school, where publicity has been almost apotheosised, are often surprised at the preference for secrecy in land transactions shown by their colleagues in England. But recollecting that habit pursued over a long period becomes second nature, we cannot be far wrong in ascribing this tendency which has developed in England to a difference in legal upbringing and to nothing else.

Section III. COPYHOLDS.

Copyhold land in England escaped the secrecy which enveloped dealings with freehold estate: for this we have to thank the base origins from which copyhold sprung. The memory of the lowly origin of this tenure, which in early days was held de facto at the will of the lord of the manor, maintained a tenacious hold on the minds of English jurists and legislators; and although this tenure gradually grew into as valuable an estate as freehold, yet in strict

theory it has always been regarded as an estate "at the will" of the lord secundum consuetudinem manerii. The steadfast reluctance on the part of English common lawyers to recognise that theory ought to be a reflection of reality was responsible for the immobilization of the law affecting copyhold estate. In the eyes of English jurists "the customs of the manor were survivals of local common law which the general common law recognised as enforceable and had left untouched".⁽¹⁾

This standpoint may account for the exemption of copyhold estates from the Act of 12 Chas. II. (c.2) which abolished the military tenures and also most of the other tenures. Against this view, however, one may urge that the advantages which the lords of the manor gained by the retention of this tenure, coupled with the political weakness of the copyholder, were in themselves a sufficient explanation for their exclusion. On the other hand, Mr Oldfield inclined to the view that hostility to an extension of the franchise was the explanation.⁽²⁾

From our point of view, however, these observations are useful only in furnishing a clue to the

(1) Halsbury's Laws of England, 2nd ed., Vol.7, p.372.

(2) F. H. B. Oldfield, op. cit., Vol.I., pp.78-80.

explanation of the continued existence of a form of tenure which had its origin in a period long prior to the "Statute of Quia Emptores" and which preserved public ceremony and booking in land transfer in an unbroken line from hoary beginnings right up to the time of its recent abolition in the year 1922.

The *raisons d'etre* of manorial customs and the justification given for their enforcement in modern times were founded on the doctrine that as manors existed from time immemorial and as their customs differed from the general common law they were, subject to certain overriding principles of relative common law, the body of reference for all questions in copyhold estate, affecting mode of use, power and methods of transfer and the line of devolution upon the death of the owner.⁽¹⁾

In harmony with this doctrine, and even then when by the gradual growth of custom the power of alienation was acquired by the copyholder, this right was conditioned to the theory that the tenant held at the "will of the lord"; therefore the transfer had to be paid for by a "fine" on the admittance of a new tenant, and the lord's consent thereto was an indispensable requisite.

(1) Houldsworth, *op. cit.*, Vol.7, p.296 et seq.

Generally speaking, the form of transfer in substitution of the tenancy consisted of a formal transfer by the tenant at the Court of his lord (until recently invariably in the presence of the homage) with a request that the lord would give it out again to the purchaser by what was called an 'Admittance', to be held on the same terms as the purchaser held it. Symbolic delivery of the land accompanied this ceremony; and an entry of the surrender and admittance, bearing the names of the homage present, was made by the lord's steward in the Court Rolls of the manor, of which the purchaser was entitled to have a copy, whence the holding derived its name.⁽¹⁾

Although the lord of the manor and his steward were advantaged by these proceedings, the tenant also stood to gain by them. Where a person could shew a colourable title to a copyhold estate, the Court of King's Bench would grant a mandamus to compel the lord to admit him, and the lord was also compelled by that writ to accept a surrender from a copyholder.⁽²⁾ The acceptance of a surrender and an admittance to copyholds might also be compelled in the Courts of Equity.⁽³⁾ Furthermore, the Court Rolls of a manor

(1) John Scriven: Treatise on Copyholds, 1821, Chaps. 4 and 5.

(2) Ibid, p.593.

(3) Ibid, pp.599-600.

being public records, were evidence for the benefit of the tenant,⁽¹⁾ and a copy of the Court Roll under the hand of the steward was deemed good evidence of the copyholder's estate.⁽²⁾ Again, the lord and steward could be forced to give access to their court rolls for inspection by the tenant or anyone having interest.⁽³⁾

In comparison with secret conveyancing, the law of transfer of copyhold estate had much to be said in its favour, and it is not surprising that many English conveyancers were of the opinion that a greater degree of certainty prevailed in the titles to this estate than in the case of freehold.

In conclusion we would add that copyhold land was spread over a large part of England and Wales, particularly in Cumberland and the Eastern Counties. But as it was often intermingled with adjoining freehold, it was often indistinguishable from it. It is stated that in Norfolk and Suffolk, where farms held under manors were very numerous, copyhold, leasehold and freehold land were often so intermingled that it became impossible to delimit the operation of one

(1) John Scriven, *op. cit.*, p.567.

(2) *Ibid.*, p.568.

(3) *Ibid.*, p.597.

tenure from the other.⁽¹⁾ However, this interesting chapter in English land law has, after a series of half-hearted enfranchisement measures ranging from the year 1841 to 1894, been brought to a close in the year 1922 as stated, and all questions affecting land hitherto held under copyhold tenure will fall to be regulated by the same principles as govern freehold estate.

Section IV. EARLY AGITATION FOR THE INTRODUCTION OF LAND REGISTERS.

During the long reign of secret conveyancing so many declarations of Uses and so many complicated interests, unheard of in the common law, had sprung up that the conception of a Register of conveyances must have seemed, in existing circumstances, a chimera to practical minds in England. Nevertheless, persistent efforts were made during the Cromwellian period for the establishment of Land Registers. This was quite in keeping with the spirit of his times, since the dominant note in Cromwell's policy was the modernisation of the country. Special committees were set up during every year of the inter-

(1) Eustace J. Harvey: Land Law and Registration of Title, 1910, pp.17-18.

regnum to enquire into the subject, but their labours bore no fruit.⁽¹⁾ But from this time onwards the subject was not allowed to pass out of the public mind and it occupied the thoughts of many of England's greatest jurists, including personages no less than Sir Matthew Hale and Chief Justice North, joint author of the Statute of Frauds. Among the papers of the latter, found after his death, were several draft Acts of Parliament dealing with this question.⁽²⁾ Bills were also considered by the House of Commons on at least as many occasions as the years 1677-8, 1685 and 1697.

Pamphlets on registration, in the period under review, circulated by both opponents and supporters, appear to have been fairly numerous, and they are interesting inasmuch as they give us a picture of opposite states of mentality on this subject, certain main features of which have not faded out in our own time.⁽³⁾

(1) Art. on Registration of Assurances Bill of 1850, cit., p.6.

(2) W. S. Houldsworth, op. cit., Vol.VI., p.532.

(3) The pretended perspective-Glass, or some Reasons of many more which might be offered against the registry reformation. Printed in 1669. C. Wilkinson and I. Burrell: Reasons against Registry, 1678. Charles Harper: Reasons for a Registry, 1678.

Some of the arguments adduced by opponents in these pamphlets are rather obscurantist in character. One writer unhesitatingly affirmed that Scotland owed its land registers not so much to the excellence of her institutions as to an original defect in the make up of her citizens and the "general poverty of the nation". This aspersion seems to have rankled in the mind of Sir George Mackenzie of Rosehaugh, for it drew from him a spirited and grandiloquent rejoinder on the causes and origin of our land registers. (1)

According to supporters, fraud in land transfer was on the increase, wherefore they advocated a General Land Registry as a sure means of combating this evil and, incidentally, as a restorative for languishing trade. The efforts of the reformers, however, were only partially successful, and they had to content themselves with the establishment of local registers, which are dealt with in the next section.

The main reason accounting for the partial failure of the reformers was the strongly rooted aversion, shared by all classes of the population, to a project which would subject all land transactions to public gaze. Elements hostile to land registration

(1) Sir Geo. Mackenzie: Treatises on the Law of Scotland, Vol.I., p.99.

played very strongly, and with evident success, on this feeling in current pamphlets, and the reformers had to make a further concession and give their assent to the proposition that only the principal heads of deeds were to be published, "which will be an effectual landmark for the purchaser or lender, who is thereby forewarned not to treat".

In this emasculated form the local registers were introduced to the Statute Book.

Section V. INSTITUTION OF LAND REGISTERS.

(a) The Local Registers.

The first local register was established in the Bedford Level - "a name given to a tract of low-lying country formerly known as the Great Level of the Fens",⁽¹⁾ by Statute 1663, 15 Car. II., c.17. Other local registries were established in Yorkshire by Statutes 2 and 3 Anne, c.4, 6 Anne, c.62, and 8 Geo. II., c.6 (repealed by the Yorkshire Registries Acts of 1884-5). The area covered by the Yorkshire Acts embraced the whole of the County of York, excluding a portion of the City of York, which is not within that part of the County known as the Ainsty. A local

(1) Encyclopedia of Laws of England; 2nd ed., Vol. II., p.146.

registry was also established for the County of Middlesex by Statute 7 Anne, c.20, regulated by the Middlesex Registry Act of 1891, and the Land Registry (Middlesex Deeds) Rules and Fee Order of 1892. The City of London Chambers in Sergeants Inn and the Inns of Court and Chancery were excluded from the operation of the latter Acts. Copyholds and certain leases of short duration were excluded from the operation of all these Acts; but as a copyhold lease was held to be a common assurance, it required to be registered when the property concerned was in a register county.⁽¹⁾

It appears from the preamble to the Act 2 and 3 Anne, c.64, that the object of this Act was to enable the cloth manufacturers of the West Riding of Yorkshire to obtain credit on favourable terms on security of their houses: on the other hand the preambles to the other Acts just mentioned recite as their purpose the protection of "frugal people" who have been defrauded by secret deeds.

The foundation of all these registers is the registered Memorial, which contains particulars of the names and designations of parties, date of execution, and descriptions of the lands affected, together

(1) Lewis E. Emmet: Notes on Perusing Title, 2nd ed., p.174.

with the names and designations of witnesses, all as appearing in the deed itself.⁽¹⁾ The registration of the Memorial had as its object the warning to purchasers and lenders of the existence of deeds which they could only ignore at their own peril.

From our point of view this system has obvious shortcomings. The failure to record deeds at full length has led to some unexpected results. For example, the existence of a mortgage will be noted on the register, but its amount will be left entirely undisclosed.⁽²⁾ This system of registration is an apt illustration of the Englishman's traditional love for compromise, in this case a compromise between publicity and privacy. In spite of this shortcoming, English writers are generally agreed that these Registers do provide a bulwark against frauds, and that the Memorials are useful as secondary evidence in the case of lost title deeds.

Registration was permissive in the Middlesex Register, but the leading part of the Act 7 Anne, c.20, Sec.1, was so framed as to ensure that priority of registration conferred priority of right. This section was strictly construed in Courts of Common Law,

(1) Charles H. Picken: Practical Suggestions on the preparation of Deeds for Registration, 4th ed. p.91.

(2) Royal Commission of 1908 on Land Transfer Acts: Minutes of Evidence, Vol.II., pp.88 and 94.

but the doctrine of Notice was applied by Courts of Equity by the famous case of *Le Neve v. Le Neve* (3 Atk 646), and the effect of that case has been that priority of registration does not avail a grantee under a deed first registered who had notice of an unregistered or subsequent registered deed. The ground of the decision rested on the dictum that "the purpose of the Act, as premised in its preamble, was protection of parties against secret incumbrances, and that its enforcement in favour of a purchaser with notice would amount to fraud. This doctrine was extended to cover cases of merely constructive notice, although its limits were not clearly defined." (1)

As regards the Yorkshire Registers (Yorkshire Registers Act 1884, Sec.14), an attempt was made to counteract the effect of the decision in the above case by the addition of a proviso that the statutory priority should not be lost merely in consequence of actual or constructive notice, but only in cases of actual fraud. Apparently even this clearly worded proviso has not been able to prevent the operation of notice from interfering with the authority of the

(1) James Edward Hogg: Article on Notice and Fraud in Land Registries, *Law Quarterly Review*, 1913, p.434.

register, because in the case of *Battinson v. Hobson* (1898, 2 Ch.403) the claim of a registered grantee for priority over an unregistered grantee was negatived on the ground that, as the first grantee was the confidential agent of the latter, with knowledge of the unregistered deed, it was actual fraud on his part to advantage himself by the statute. No actual contrivance was alleged, but the case "was merely an extreme case of actual notice of an adverse interest."⁽¹⁾

The aftermath of these decisions has proved very detrimental to the efficacy of these registers. The question as to what constitutes "Notice" bristles with difficulties, and many voices have been raised against the grafting of this doctrine on to the original structure of the Middlesex and Yorkshire Registers. In view of these circumstances it might occur to anyone that the incentive to place a deed on the Register immediately after execution is greatly diminished, and that this is the case is affirmed by one authority on the subject of registration, who states, "What the profession think of the risk (i.e. "of not registering promptly) is shown by the practice which obtains in the Middlesex Registry, in "which it is believed that immediate registration of

(1) James Edward Hogg, op. cit., p.435.

"a mortgage is seldom effected."⁽¹⁾

Another awkward problem in connection with registration in England has been raised by the practice of creating Equitable Mortgages by mere deposit of title-deeds. Decisions on cases brought under the Acts, so far as the Middlesex Registry is concerned, require that Equitable Mortgages must be registered only if associated with a writing. In these circumstances a mortgage created by mere deposit of deeds, without any memorandum, would be effectual against any mortgage subsequently registered. On the other hand, in the case of the Yorkshire Registers, Mortgages created by deposit of deeds even without writing must be registered (Yorkshire Registration Act, 1884 (47 & 48 Vic., c.54, Sec.7: *Battinson v. Hobson*, 1896, 2 Ch. 403)).⁽²⁾

(b) Registration of Title.

After the introduction of the local registers public attention was once more focussed on the subject of a General Registry, notably so in the years 1739, 1758 and 1807, but the movement in its favour cannot be said to have gained much momentum.

(1) Eustace J. Harvey, op. cit., pp.197-8.

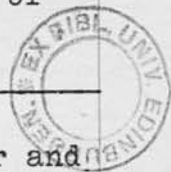
(2) Halshry's Laws of England, 1912 ed., Vol.21, pp.86-7.

Beginning with the second decade of the last century, however, interest in the question was unmistakably revived, and a Royal Commission in 1828, presided over by Lord Hyndhurst, recommended the establishment of a General Registry. Bills embodying this recommendation were introduced in the years 1830, 1845, 1846, 1851 and 1853, none of which passed into law.⁽¹⁾

An important Royal Commission which was appointed in the year 1854, and which issued its report in the year 1859, condemned the project of a General Registry of Deeds and recommended in its place a system of Registration of Title, following upon which a Bill was introduced in 1859, which met the same fate as its predecessors. A striking feature of the report of this latter Royal Commission was its recommendation that the legal and equitable interests in land should be merged into a statutory estate which should pass by registration only.

From this time onwards, apart from the Select Committee of the House of Commons appointed in 1878, which favoured the establishment of a Registry of Deeds but on that occasion chiefly as the groundwork for a Register of Title, the supporters of the former system definitely lost ground, and the majority of

(1) Edmund Bell Blyth: Article on Land Transfer and Land Registry, Law Quarterly Review, 1896, pp.359 et seq.



reformers thenceforth bent their energies towards the introduction of a Register of Title, constructed more or less on the lines of a Register of Stock.

Lord Westbury's Act of 1862.

Lord Westbury's Act of 1862, which introduced Registration of Title on to the Statute Book, was an outcome of the Report of 1857.

It provided for the voluntary registration (but with right of subsequent removal from the register) of estates in freehold tenure and leasehold estates in freehold lands and the grant of an indefeasible title. By Sec.5 of the Act, no title could be registered for indefeasible title except such as a Court of Equity would hold to be marketable. Provision was also made for settling the boundaries of the lands to be registered, embracing the service of notice on adjoining proprietors, who might lodge objections. When all objections were disposed of, registration was to be effected in the manner prescribed in Sec.14 of the Act. The Register was planned on the form of a "mirror of title", and, therefore, included a record of all the existing powers over the property and estates therein. There was also a provision for registration without an

indefeasible title (Sec.25), but this never came into actual operation.

On the lines on which it was conceived, the Act contained the germs of its own destruction. As registration was voluntary, there was little hope of initial encouragement in an environment charged with opposition to the introduction of a novelty of this kind. Again the insistence of the title being in a marketable state was most unfortunate, as in practice it meant at that time "a title absolutely flawless for 60 years at least".⁽¹⁾

In the course of 20 years of its working, 488 properties only were registered, of which 131 were subsequently removed from the register.

The Royal Commission appointed in 1869 voted the Act a failure, the failure being ascribed to the great expense and delay consequent on the exhaustive examination of title by officials, before they felt confident in issuing a grant of indefeasible title. To get round this difficulty the Commission suggested the introduction of a system of registration with temporary possessory title. Bills for carrying the amended scheme into effect were introduced in the years 1870 and 1873, which did not pass into law, but

(1) Sir C. F. Brickdale: Methods of Land Transfer, p.158.

finally Lord Cairns succeeded in passing a measure through Parliament which became the Land Transfer Act of 1875. This Act closed Lord Westbury's Register to any new dealings, and by an Order of the Lord Chancellor, since the first day of January, 1899, existing titles recorded under Lord Westbury's Act have been transferred to the Registers set up by later Acts.

Land Transfer Act of 1875.

The L.T.A. of 1875, which was followed by the L.T.A. of 1897, was, until the L.R.A. of 1925 which repealed the two former Acts, referred to as the principal act.

It provided for the registration of legal estates in fee simple and absolute interests in leaseholds. Copyholds, or certain customary freeholds, or leaseholds derived out of copyholds or such customary freeholds, were excluded from the operation of the Act (Sec.2). Tenants for life of settled estates were, in practice, registered, but it has been doubted whether this was authorised under the Act.⁽¹⁾ Charges could be registered.

(1) H. Greenwood: Article on Registration, or Simplification of Title, Law Quarterly Review, 1890, p.154.

In order to keep the Register free from complications a statutory proprietor was created with specially defined powers of transferring and charging the land. This was in harmony with the aim of "keeping trusts off the register". The interests of beneficiary owners were protected by inhibitions and cautions placed on the register.

Certain specified burdens were declared by the Act to affect all registered land, while other specified burdens might be registered as "restrictions".

The voluntary principle adumbrated under Lord Westbury's Act was retained.

The Act contained two significant features which pointed out the road which registration of title in England had to follow if a more economical working of the system were to be attained, and its success for the future assured. These were, first, the provision which gave unlimited discretion to the Registrar to accept a title as absolute (Sec.17); and, second, the provision introducing "possessory title", which was a method of overcoming the costly and laborious examination of title required on application for registration with absolute title.

From evidence led before the Royal Commission of 1908, it was clear that registered chargees were not satisfied with the position given to them under

Sections 25 to 27 of the Act. Under these sections the registered proprietor of a charge had the principal powers open to a mortgagee, namely, right of entry, foreclosure and sale; but as he was not in possession of the legal estate by the terms of the Act, it was impressed on the Commission that, as against an unregistered mortgagee, he was at a disadvantage in the event of his wishing to tack mortgages, or to maintain an action of ejectment or sue on the covenants of a lease. Arising out of this disability a practice had grown up of duplicating mortgages, one of which was placed on the register but the other was unregistered, as it conveyed the legal estate. The result was that in many cases the expense attendant on a loan became actually greater under registered than under unregistered conveyancing.

The supreme defect of the Act, however, was its rejection of the principle of compulsion. In such circumstances a repetition of the failure that followed a similar experiment under Lord Westbury's Act might with assurance have been prophesied, and this expectation was fulfilled.

The Committee of 1879 pronounced the Act a dead letter and came to the depressing conclusion that compulsion was not a feasible proposition. Nevertheless, this Committee had some positive recommendations

for the reform of the law to its credit, among which were the setting up of an ad valorem scale of solicitors' fees, the substitution of shorter forms in deeds for the lengthy ones hitherto in use, and the appointment of a "Real Representative" in whom real property should vest on death as personal property vests in the executor. These recommendations bore fruit in the passing of the Solicitors' Remuneration Act of 1881, the Conveyancing Act of the same year, and the Land Transfer Act of 1897. The last of these recommendations proved, as was intended, particularly helpful to the cause of registration.

Compulsory Registration Acts of 1897 and 1925.

Lord Halsbury must be given credit for realising that without the element of compulsion any system of registration which would be introduced into England would be built on sand. Moreover, he held firmly to the standpoint that if the ideal of a register of land approximating to a register of stock were to be attained, a lot of undergrowth in the general law would have to be cut down, and the law relating to real estate assimilated to that of personality wherever possible. This process had already been advanced by the Settled Land Act of 1882 which placed the interest of the remainder-man under a

settlement, and family charges under the control of the "tenant for life", so far as a purchaser was concerned. As a step further in this direction, Lord Halsbury sponsored the recommendation of the Committee of 1879 with respect to the appointment of a realty representative.

Bills on these lines were brought forward by him in the years 1887, 1888 and 1889, none of which, however, succeeded in getting on to the Statute Book. Later on similar Bills were also unsuccessfully brought to the notice of Parliament by Lord Herschell. Finally, the agitation for compulsion was rewarded by the passing of the Land Transfer Act of 1897, which set up machinery under which compulsory registration might be established on the initiative of the Privy Council, or on the expressed desire of any County Council in England and Wales. These provisions were re-enacted, with modifications, by the Land Registration Act of 1925 (Secs.120-5). The latter Act repealed the Acts of 1875 and 1897, but re-enacted them with alterations "adapting them to the new general "law instituted by Lord Cave's consolidating Acts of "1925. It also incorporated most of the recommendations of the Report of the Royal Commission of "1908."⁽¹⁾

(1) Sir C. F. Brickdale and John S. Wallace: Land Registration Act of 1925, 3rd ed., p.1.

Up to the time of writing, the County of London, excluding Middlesex, and the County Boroughs of Eastbourne and Hastings, have been the only public bodies to avail themselves of this opportunity. An attempt (in 1902) to put the Act of 1897 into operation in Northamptonshire failed.

The occasions on which land must be registered in a compulsory area are (1) in the case of freehold, on sale, and (2) in the case of leasehold land, on a grant of a term of not less than 40 years, or a sale of a term having not less than 40 years to run.

Compulsion was achieved by the enactment that the legal estate would not pass to the grantee until he was registered as proprietor (L.T.A. 1897, sec.20 (i); L.R.A. 1925, sec.123 (i)).

Where compulsion applies, in the event of non-compliance with the Act, the question arises as to what becomes of the legal estate and what are the rights of a purchaser as against a subsequent disponee. In such event, the authors of the Book on the L.R.A. of 1925 are of the opinion that the legal estate will remain with the vendor as trustee for the purchaser, and that any subsequent disponee would be bound by notice of the purchaser's title.⁽¹⁾ However, the risks incurred by non-registration are so heavy

(1) Sir C. F. Brickdale and John S. Wallace, op. cit. p.56.

that fairness dictates the statement that the provisions in the Act relative to compulsory registration are quite adequate for their purpose.

Registration with "possessory title" is all that a purchaser can be compelled to apply for; but since the Registrar is empowered to grant absolute title on his own discretion, without the consent of an applicant, and as the fees on application are now the same in both cases, absolute title is usually granted and usually applied for.⁽¹⁾

The effect of registration with absolute title (L.R.A. 1925, sec.5) is to vest in the registered proprietor an estate in fee simple in the land, together with all parts and pertinents, subject only to (a) Incumbrances and other entries on the register, (b) Over-riding interests affecting the land (these do not require to be registered), and (c) "subject to minor interests of which the proprietor has notice as between himself and the persons entitled to the minor interests where the first proprietor is not entitled for his own benefit to the registered land".

Among over-riding interests are (L.R.A. 1925, sec.3, xii) "rights acquired under the Limitation Acts".⁽²⁾ In the case of *Chowood v. Lyall*, 1930,

(1) Harold Potter: Principles and Practice of Conveyancing under the L.R.A., 1925, pp.36-37.

(2) L.R.A., 1925, sec.70, sub-sec.1(f).

2 Ch., 156) the Court ordered that the Register be rectified in favour of the defendant in respect of that part of the land in dispute which he had acquired by adverse possession. There is, moreover, a general provision for rectification of the register (L.R.A., 1925, sec.82) which is wide enough "to cover all cases in which the purported conveyance confers no title on the registered proprietor....."(1)

Section VI. REGISTERS OF THE ISLE OF MAN.

In the opinion of Manxmen, the purchase and mortgaging of land which takes place so freely in this island is due in no small measure to their system of registration of deeds. Their contention would appear to be not without some justification when cognizance is taken of the fact that the tenure of land settled by the Act of Settlement of 1704 is not freehold, and has been likened by legal writers to customary freehold in England.⁽²⁾ On the other hand, conveyancing in the Island is free from the many technicalities which complicate the like branch

(1) Harold Potter, op. cit., p.39.

(2) Reginald D. Farrant: Art. on Manx Land Tenure, Law Quarterly Review, 1906, p.136.

of law in England, and the Statutes of "De Donis and of Uses" never formed part of its law.

A system of registration applying to mortgages only was introduced by a provision in the above mentioned Act. But registration was evidently in vogue long before this, for it is stated that the custom of registering deeds prevailed in this area prior to statutory enactments on the subject;⁽¹⁾ and we are further indebted to the present Registrar of the Manx Register of Deeds for the information that registrations in his office go back as far as the 17th century.

The enactment in the Act of Settlement relating to a Register of Mortgages was repealed by a general registration act in the year 1847, entitled, "An Act "to render more effective the registering and recording of all Deeds, Conveyances, Wills which shall "be made of any lands within the Isle of Man." The preamble to this Act recites "that it is expedient to establish a general register to encourage and "promote the introduction and investment of capital "by facilitating and rendering more secure all pecuniary transactions relative thereto, and for the prevention of all secret and fraudulent conveyances...."

This Statute has been followed by amending Acts of the years 1848, 1868, 1873, 1896 and 1923.

(1) A. W. Moore: History of the Isle of Man, Vol.II. p.904.

Compulsion has been obtained by the enactment of the pioneering Act (sec.2), as amended by sec.2 of the 1848 Act, which renders all sales and incumbrances, etc., not enrolled or registered void as against a subsequent bona fide purchaser or incumbrancer for value whose titles have been first duly attested or captioned and registered. A right on the Register may be defeated by a claim arising out of adverse possession for a period of at least 21 years. Either the original deed is recorded or a certified copy of a duly captioned deed, prepared in the registry, is registered and enrolled. In the case, however, of Wills or Testamentary Writings, memorials only are recorded (sec.8 of 1847 Act, as amended by sec.19 of 1923 Act).

Strange to say, deeds not affecting land may be registered on a voluntary basis (sec.23 of 1847 Act).

There is also a provision (sec.31 of the 1847 Act, as amended by sec.17 of 1923 Act), which is more closely associated with a system of registration of title than with registration of deeds, and which empowers the Registrar to cancel all incumbrances on delivery of attested discharges. Supplemental to this provision there is another (sec.12 of the 1923 Act) which affords relief by way of indemnity to any purchaser or mortgagee suffering through an erroneous cancellation of an incumbrance.

IRELAND.INTRODUCTORY.

The law of real property in Ireland is on the whole the same as in England. It is the result of the grafting of the English feudal law on to Irish communal law in Tudor times and in the reigns of Elizabeth and James I. The Real Property Statutes after the Union generally extended to both England and Ireland; and the conveyancing law and practice of both countries, except where it was modified in Ireland by the system of Registration of Deeds and Assurances, never showed any marked differences. Later on certain statutory divergences from the English law appeared in Irish law, but they were principally connected with the position of landlord and tenant. For a considerable period the legislative changes that were made were undoubtedly conceived in the interest of the landlord; but since the latter half of the last century, legislation made a volte face, and a series of measures have been promoted in the interest of the tenant. The latter type of legislation had political as much as economic objects in view, but of course this may be affirmed of the bulk of Irish land legislation of both recent and

earlier times. In our own days the physiognomy of Irish conveyancing has been visibly altered by the introduction of Registration of Title.

Section I. REGISTRATION OF ASSURANCES.

In the year 1708 (6 Anne, Ch.2), in the same reign which witnessed the introduction of the Yorkshire and Middlesex Registers, an Act establishing a General Registry of Deeds and Assurances was put on the Statute Book. A definite political aim, namely the maintenance of the power of the Protestant minority, underlay the introduction of the Irish Register, whereas the object in passing the English Acts was the economic improvement of landholders. This purpose was plainly avowed in the preamble to the Irish Act, which recites that it has been passed "for securing purchasers, preventing forgeries, and "fraudulent conveyances of lands which have been frequently practised in the Kingdom, especially by "Papists, to the great prejudice of the Protestant "interest thereof". Evidently the promoters of this Act cherished the notion that by its means Roman Catholics would not be able to evade the consequences of forfeiture under the penal statutes which had been

passed a few years previously. Nevertheless, when happier times prevailed in Ireland, the statute continued to operate to the benefit of all classes of the population, and, save where it has been amended, it has remained on the Statute Book until the present day.

The Act provided for the registration of deeds, assurances, wills and other matters affecting land; but the Register has never been kept "pure", like our Scottish Register, and miscellaneous writs, which are not comprehended in the above description of registrable matter, have been offered and accepted for registration. It has been stated that even Policies of Insurance have been registered.⁽¹⁾

Registration is not compulsory, but it is the general practice, as omission to register may involve loss of priority and weakness of title (sec.4). Prior to the Voluntary Conveyances Act of 1893, registration under the principal Act gave no priority to a voluntary conveyance, if only volunteers claimed under it (re Flood, 1861, 13, 1 ch. 312). Wills, however, are rarely registered, because failure to do so does not incur any of the consequences attached to failure

(1) Royal Commission on Registration of Deeds in Ireland, 1878; 1st Report, p.29 of Appendix.

to register assurances. Moreover, the Act does not extend to leases not exceeding 21 years, where possession goes with the lease (sec.14). But they are registered as a matter of practice. Only where there is a written document to work on can registration be carried out; therefore, Equitable Mortgages unaccompanied by writing, and vendor's lien for unpaid purchase price are outwith the scope of the register; besides, there are other exceptions of a minor character. The doctrine of notice, to which we have already referred, has also been fastened on to the Irish Register by Courts of Equity, with injurious results. For these reasons the Register is incomplete, and complete reliance cannot be placed upon it.

Registration is effected by the registration of a "Memorial", and "Affidavit", to which we shall afterwards refer, submitted to the Registrar along with the deed, and not by full length transcription of the deed itself.

The "Memorial" is the foundation of the Registry and "when properly prepared contains all the necessary particulars for the entries in the several books which constitute the system of registration".⁽¹⁾ In substance, the Memorial is an abstract of the deed;

(1) Royal Commission of 1878, 1st Report, p.127 of Appendix.

but since by the Statute it need only contain the day of the month and year, the names and designations of parties to the deeds and witnesses, and a reference to the lands affected, coupled with the name of the county and barony, city or town where the property is situated, all as described in the Instrument, such Memorial falls far short of being even an abstract of the Instrument sought to be registered. It appears, however, that most Irish solicitors have adopted the practice of submitting for registration a Memorial in an expanded form, containing an abridged statement of the contents of the deed. But in making his comparison of the Memorial with the deed, the Registrar ignores all information contained in the Memorial which goes beyond the bare statutory requirements. It is executed under the hand and seal of one or more of the grantors or grantees of the deed, and is attested by two witnesses, one of whom must have been a witness to the execution of the deed. The latter witness makes an affidavit which is registered along with the Memorial, proving the signing and sealing of the Memorial and the Instrument. This form of proof of verification was prescribed by the principal statute and is responsible for great inconvenience in those cases where the key witness has died, or, where alive, refuses to lend his aid to the

admittance of a deed for registration. There have been cases where witnesses have had to be bribed to do their duty.

In the light of our experience we would not take very kindly to a Memorial, hedged in by these restrictions, as a suitable basis for registration. The fact also that a Memorial which fails to comply with the statutory requirements will render the registration "invalid and worthless", although it is accepted by the Registrar, is not likely to make us change our attitude in this respect.⁽¹⁾ (See *Butler v. Gilbert*, 1890, L.R.I. 230) Nevertheless the fact remains that the Irish Commissioners of 1879 were convinced from the evidence led before them that there was a "general approval of this system of registration", and, as regards the Memorial, they added, "notwithstanding these defects (i.e. paucity of particulars of the deed), the present form of Memorial is much valued by conveyancers in Ireland, as affording secondary evidence of the contents of lost instruments."⁽²⁾

Just as in the history of Scottish land registration, instances have not been wanting where statutory requirements relative to the technique of registration have not always been observed, so we have similar

(1) Royal Commission of 1878: 1st Report, p.7 of Appendix.

(2) Royal Commission of 1878, p.xxviii. of 1st Report.

happenings to record in the history of Irish land registration. But there the comparison ends. Whereas in Scotland sins of omission have been merely of a minor routine character, in Ireland they struck at fundamentals, tracing their origin to insufficiencies in the identification of lands, in Memorials, for searching purposes. This weakness in Irish registration conveyancing has tended to obstruct access to the Register and has resulted in the multiplication of Indexes to the Register, with consequent increase of labour and expense in searching. This trouble has been a long standing one, and an attempt was made to restore order out of chaos by the Act (of 2 & 3 William, c.87) which prescribed precise territorial arrangements for the Land Indexes. This Act was reputed to have intended that, as a necessary pre-requisite for registration, the Memorial should contain particulars giving local situation of the land for the compilation of the Land Indexes; but as this condition was not made absolute or general in the Act, when the question came before the Court, in the case of Gardiner v. Blessington, it was decided that, under Sec.29 of the Act, Memorials must still be admitted to registration, if the omission to state the locality of the lands exists in the deed itself. To meet this situation, Memorials which are weak or defective in

the matter of identification of situation of subjects are, according to the nature of the omission, entered in one or other of separate Land Indexes, over and above the normal Land Index, called "No Barony Book", "No Parish Book" and "General Index". The mischief, however, is not confined merely to Memorials defective as to local situation of subjects. The Registry has also to contend with Memorials which make no attempt to give any description of the lands. These are mainly of the type relating to lands which are conveyed in general terms, such as "all my lands in the County of X". Obviously from such Memorials no entry can be made in any of the Land Indexes, and they can only be referred to through a Names Index.⁽¹⁾

Section II. REGISTRATION OF TITLE.

The latter half of the 19th century witnessed a great change in the attitude of British Statesmen to Irish economic problems. From then on successive British Governments realised the necessity of rescuing the peasants of Ireland from a state of poverty and dependency which was ruinous to everybody concerned alike. It was recognised that if even a semblance

(1) Royal Commission of 1878, 1st Report, pp.128-138.

of order and prosperity were to be restored in Ireland, then it was essential that a contented peasantry be established and that the only way to achieve this purpose was by giving the agricultural tenant an opportunity of becoming proprietor of the land which he tilled. Owing, however, to the general poverty of the country, this goal could be reached only by the advancing of public monies to the peasants, whereupon there followed a continual series of Acts of Parliament, all of which plainly bear the stamp of paternalism.

The earliest beginnings of this policy, the consummation of which was to change the whole character of the Irish peasantry and the Irish countryside, can be traced to the Bright Clauses of the Land Act of 1870 and to the Glebe Loan (Ireland) Acts of 1870 to 1875. Later on the Land Commission was constituted by the Land Law (Ir.) Act, 1881, and then followed the "Ashbourne Act" of 1885, in which this policy was definitely proclaimed, and by which even more generous terms were offered to the Irish tenant on which to buy his land. After the introduction of the "Ashbourne Act", and beginning with the Congested Districts Board Act of 1891, one Act after another was placed on the Statute Book, all of them devised to expedite and extend the process which was begun in

1870. When the last of these Acts - Irish Land Act (Free State), 1923 - will have run its course, the last remnants of agricultural tenancy will have been liquidated and a silent agrarian revolution will thus have been accomplished.

The political and economic consolidation of a hitherto oppressed class in society always brings in its train a demand on behalf of that class for changes in the institutions of the state which will accord with its changed status and condition. Ireland also obeyed this law of social and economic evolution, and so far as the machinery of registration is concerned, the demands of the newly fledged owners were for a system of land transfer that would expedite and cheapen transactions relating to land. The older system of registration, dating back to the reign of Queen Anne, was out of date, and its comparatively costly nature was a reflex of the times when only the monied classes held proprietary rights in land. The defects of the older system of registration from this point of view being obvious, it was natural that attention was drawn to the only other alternative, which was, of course, Registration of Title. It ought to be mentioned that the allurements of the new system caught the fancy of Irish reformers even before the policy of peasant proprietorship was fully launched;

nevertheless, the synchronisation of Registration of Title with land ownership may be truly said to have taken place with the advent of the agrarian reforms.

(a) Record of Title Act (Ir.) 1865.

The first legislative contact which Irishmen made with Registration of Title took place about the same time as Englishmen made theirs. Just as England had her Lord Westbury's Act of 1862, Ireland had her Record of Title Act of 1865. Great expectations, similar to those which were aroused in England by the passing of the former Act, were dangled before the eyes of the Irish public with the passing of the latter Act; and, indeed, there were better grounds for these in the case of Ireland than in England.⁽¹⁾ To note one reason alone for this optimism, the operation of the Irish Statute was confined to titles which had passed through the Landed Estates Court, which meant that the root-title for registration was an indefeasible one.

Notwithstanding this initial advantage, down to the year 1879 only 681 titles were registered under the Act, and it proved a dead failure; a fact which

(1) H. Brougham Leech: Registration of Title and Registration of Assurances, pp.55-6.

need occasion no surprise, since the Act, like its predecessor in England, was vitiated at its commencement by the failure to insist on the principle of compulsion. Purchasers through the Landed Estates Court could escape their obligations under the Act by intimating their objection to registration under the new system, in which event their title was remitted to the Registry of Deeds. Moreover, a registered owner could, with the necessary consents, close the Record at any time and remit his land to the same Registry. Other reasons, such as lack of staff and unsympathetic direction at the top, have been put forward in explanation of the failure of the Record Act, but on reflection it seems quite clear that the lack of compulsion would have been quite sufficient by itself to nullify the intentions of the promoters of the Act without any additional shortcomings.

The Registry set up by the Act was wound up by a provision in the next Act dealing with Registration of Title (Local Registration of Title Act, 1891, sec. 18), so that after 1st January, 1892, on a dealing with land recorded under the former Act, the Record must be closed and the land concerned transferred to the Register under the latter Act.

(b) Local Registration of Title Act, 1891.

The Irish Registration Act of 1891 was modelled on the English Land Transfer Act of 1875, and, as amended by the two Registration Acts of 1908 and 1909, has continued to regulate the procedure for registration of title in Ireland. It did not repeat the mistake of the Record of Title Act of relying on the good-will of purchasers of land. At any rate it makes registration a matter of compulsion when land has been acquired by the tenant under any of the Land Purchase Acts, and when it is subject to any charge for the repayment of an advance on account of the purchase money. To ensure the non-evasion of the Act, provision is made that the registration in such cases is to be effected without waiting for application by the tenant (sec.23). Houses which are the subject of purchase under the Small Dwellings Act (Ir.) 1899 have also been brought within the sphere of compulsory registration of the Act of 1891. In these enactments we find a marked divergence from the practice in England. In England, as we have seen, compulsion is on a territorial basis, whereas in Ireland the area factor is ignored. The Government gave proof of its benevolent attitude towards the measure by the enactment that registration, if

effected within one year of a grant, was to be carried out without any charge to the tenant. In all other cases first registration under the Act is voluntary.

This Act, although it is in some respects an improvement on its model, the English Act of 1875, nevertheless has decided weaknesses. One might almost read into the Act a fear expressed by its promoters of permanently binding owners of land to the new system. At any rate such is the impression gained by the concession that purchasers of land under the Land Purchase Acts who have paid up their annuities and other proprietors who have voluntarily registered (sec.20) may close the Record against the land by registering a Memorial, expressive of that intention, in the Registry of Deeds. We are informed that this step is not often taken, but the power to do so is nevertheless there, and the upshot of the matter is that an unhealthy dualism is being perpetuated. Indeed, considering the framework of the 1891 Act and the survival alongside of it of the Register of Deeds, dualism was inevitable. The nature of the problem arising out of this situation may be gauged from the text of the 1891 Act, which contains the enactment that all dealings with a lease of registered land must be registered in the Register of Deeds,

whether registered as a burden or not under the Act, unless registered as a leasehold interest under sec. 53.

The Act contains the usual provisions commonly associated with Registration of Title with regard to the effect of an entry on the Register and with regard to facilities for protection of rights over registered land by lodging cautions and inhibitions (sec.34 (i) and 44 (3)), and it has fallen into line with England through the operation of Secs.59 and 60 of the Land Act (Free State) of 1923 which grafted possessory and qualified titles on to the Register; but it contains some notable changes which do not appear in similar English Acts, the first being the enactment that no title can be acquired by adverse possession unless by Order of the Court; the second, that local offices are established alongside the metropolitan office, with an arrangement between central and local offices for reciprocal notification and recording of all transactions (sec.12 (i)); and, lastly, that the course of devolution of registered land acquired under any of the Land Purchase Acts is altered to correspond with the succession to personal estate. This last provision was inserted in the Act in order not to violate the tradition of an equitable distribution of the family estate which was upheld

by the Irish peasantry when they were tenant farmers.

P A R T II.

FEUDAL REGISTERS OF SCOTLAND.

CHAPTER I.

FACTORS WHICH INFLUENCED THE INTRODUCTION
OF THE FEUDAL REGISTERS.

INTRODUCTORY.

In this chapter we intend to outline some of the causes, particularly those of a juridical, economic and political character, whose cumulative effect made almost inevitable the comprehensive scheme for registration of deeds affecting feudal subjects, which was introduced in 1617.

In general the observations which follow are made with reference to their relation with the Act of 1617, although in certain respects, no doubt, some of them might equally apply to the legislation on registration of the 15th and 16th centuries. For our present purpose the latter legislation may be viewed as rough stepping-stones to the main structure of land registration, and as such will be dealt with in the

following chapter which will serve at the same time as a prelude to a review of the Act of 1617.

Section I. JURIDICAL FACTORS.

If one were asked to state what causes in the law and practice of Scotland singularly favoured the introduction of our land registers, one might safely reply that they were:- first, the mode in which the relationship between superior and vassal in Scotland developed; second, our use of Notarial Instruments; and lastly, the state of our law on possession.

In Scotland the vassal never lost contact with his superior. Whether a property changed hands as a result of sale, death, or decree of court, the interposition of the superior to the changed set of circumstances always remained a necessity. Contact with the superior might be delayed, but in the long run it could not be avoided. On the other hand, in England, as a result of the Statute "Quia Emptores", the power of alienation was freed from a restraint by the lord.

In consequence of our practice in this respect, and even before the land registers were introduced, each transfer of land became the subject of attention

on the part of two sets of people, namely, superiors and vassals, and thus there was brought into the light of day that which was often clouded in obscurity south of the Tweed. This could not have been without its effect in reconciling us at a later stage to the wider publicity attendant on a system of registration. Furthermore, the reward we obtained for our tenacious adherence to the spirit of the feudal law was uniformity in conveyancing practice and an escape from technical complications which have been so characteristic a feature of English conveyancing.

As regards the second cause, its importance cannot be overestimated. Scotland enjoyed one great advantage over England inasmuch as writing became a solemnity in land transfer in the former country from a comparatively early period. As we have already mentioned, in England written deeds could be dispensed with by manipulations with "Uses", and it was not until so late a date as the year 1677 that writing was first required as a statutory necessity in that country.

The position in Scotland was fundamentally different. By the law of Scotland, Sasine was always indispensable for the completion of the vassal's right to land, although according to our earlier ideas on this subject the term "Sasine" was confined

to symbolical delivery of possession by or on behalf of the vassal. When, however, the art of writing came into more general use, the term "Sasine" was enlarged to comprehend not only the ceremonial giving of possession but also the document - a Notarial Instrument, prepared by a Notary Public, containing an attested account of this ceremony; and in the course of time this document came to be recognised "as the only admissible evidence that sasine had been given and that the grantee had acquired a real right". This document received general acceptance from the importance which was attached to the person who prepared it. The exact date when the practice of expeding a Notarial Instrument came into use cannot be fixed with any degree of certainty, but it can be placed about the beginning of the 15th century.⁽¹⁾

It is quite true that faith in the integrity of Scottish notaries received some severe shocks, and our legislators of the 16th century did not mince their words when dwelling on the corruption practised by some notaries; nevertheless the Notarial Instrument when free from fraud was a remarkably vivid and precise document, and our ancestors were not slow to perceive its worth as material out of which a register

(1) Duff, p.102. Ersk. Inst. ii. 3, 34. Stair, ii. 3, 16.

could be constructed. Dr Maitland Thomson⁽¹⁾ has no hesitation in affirming that "because the Land Register consisted mainly of Notarial Instruments, it is strictly correct that it is to the Notarial Instrument that we owe our land registers". It would be difficult to deny him some justification for his opinion, but it is open to the criticism that its unqualified acceptance would narrow down the field of investigation of the origins of our land registers.

Our consistent refusal to recognise mere possession alone as a basis on which to found a claim to land, has stood us in good stead when the question of the land registers occupied the attention of our ancestors at the end of the 16th and the beginning of the 17th century.

On the subject of adverse possession of land, Henry Home (Lord Kames) expresses himself thus ... "With respect to land, our positive prescription differs widely from the Roman usucapio.... If a portion of deserted land be laid hold of by a private person, no length of time will transfer the property to him."⁽²⁾

Prescription in heritable rights was a very belated development in Scotland and "at the time when

(1) Public Records of Scotland, p.107.

(2) Henry Home: Elucidations respecting the Common and Statute Law of Scotland, p.259.

"Sir Thomas Craig wrote it appears such prescription
 "was unknown as a principle of Scottish law".⁽¹⁾
 Naturally, in the passage of time it was felt that
 some sort of compromise had to be made if those evils
 which arose from the application of the old doctrine
 that every title had to be traced through an absolute-
 ly flawless progress to a Crown Charter were to be
 avoided; thus our Act of 1617 on prescription is
 merely the measure of such a compromise. On examin-
 ing this Act, however, it will be readily grasped
 that its authors did not intend to permit a title to
 land to be acquired by mere possession alone, even
 within the restricted period introduced by the Act;
 and any such attempt is quite clearly barred by the
 terms of the Statute. Taking this Act into conjunc-
 tion with the Land Registers Act of the same year, it
 becomes obvious "that they were so framed that pre-
 "scription shall operate only in favour of the writ-
 "ten and recorded title".⁽²⁾

The standpoint of our feudal lawyers on this
 question certainly removed one deterrent to the in-
 troduction of the land registers, and we have already
 learnt from the examples of England and elsewhere

(1) R. Campbell: Land Tenures in Scotland and Eng-
 land, L.Q.R. 1886, p.168.

(2) Ibid., p.169.

what obstacles can be raised against the introduction of land registers by tolerating a principle of law which admits bare possession as a medium for the acquisition of land.

Section II. POLITICAL AND ECONOMIC FACTORS.

As we had occasion to remark in the case of Ireland, legal changes are closely allied with political and economic changes. Where economic and political life remains static, the law and the machinery of law also tend to remain fixed and unaltered. Making, therefore, all due allowance for the favourable state of the law of Scotland to the introduction of our land registers, the possibility yet remains, that were it not for the extraordinary transformation which took place in the whole material and spiritual life of Scotland consequent upon the Reformation, our contribution to this branch of legal reform would never have been made in the year 1617. At any rate, our contribution in this field would have been belated, and our justified claim as the pioneers of complete national registers could never have been made.

Some of the tasks which the more idealistic leaders of the Reformation attempted were, considering

the times, of so revolutionary a character and struck so deep at the root of the economic and political life of the country that it was not surprising that accomplishment fell far short of expectation. As has happened with many other great economic and spiritual upheavals, the scene which unfolded itself before the eyes of the Scots reformers, after the tumult and clamour had died down, was not what they had envisaged.

The bitterest pill which the reformers had to swallow was undoubtedly the disposal of the property of the "Auld Kirk". At that time the Roman Catholic Church had such an enormous hold on the real property assets of the nation that Church lands yielded, in the estimate of Sir George Mackenzie, one half of the total income of Scotland derived from land.⁽¹⁾ From this fact it becomes clear that once it was decided that the Church was to be expropriated, the problem of the division of this enormous landed estate was bound to cause dissension and that in the process of re-distribution of this heritage there was involved a re-classification of owners on a gigantic scale.

The fate of this property and the social conflicts which centred round it are part of the common

(1) See Alexander Cormack: *Teinds and Agriculture*, p.83.

history of Scotland. On our part it is relevant to note that the hopes of John Knox and his supporters were dashed to the ground and also that any chance which the State may have had to enrich itself with the spoils of the Reformation was lost, partly on account of the rapacity and boldness of the Protestant nobles and partly on account of the inability of the King during his minority to make good his claims. Even the Annexation Act of 1587 played into the hands of the nobility, since it served to confirm them in their legal right to hold in perpetuity that which they had previously possessed under the precarious title of Commendators. Throughout the rest of the reign of King James VI. the process of converting commendatorships into temporal lands proceeded apace, and the extent of the change about of land ownership during the period following the Act of Annexation, until the year 1617, when the Land Registers were inaugurated, may be gauged from the fact that between the years 1587 and 1625 "there were "erected into temporal lordships 21 Abbeys, 7 Priories, "6 Nunneries, 2 Preceptories and 2 Monasteries".⁽¹⁾

No great exercise of the imagination is required to realise that these great changes marked a turning

(1) P. Hume Brown: History of Scotland, 1902, Vol. II., p.287.

point in the territorial fortunes of many people in Scotland, also that fresh anxieties concerning the validity of their titles to their doubtful acquisitions must have then arisen to trouble the minds of the fortunate newly rich.

The uprooting of so many former owners of land and their displacement by a new class of owners also gave rise to a further complication. It brought dire consequences for the tenants of land comprised within the areas of these transfers, who could not show a heritable title to their holdings.

Just as in our own times industrial magnates who purchase estates from old country families sometimes do not respect the ties which bound the old owners to their tenantry, so it happened then, but on a far more universal scale, that the Scottish nobility who acquired the Church lands after the Reformation cast all considerations of humanity or sentiment aside, and the lot of Scottish tenants greatly deteriorated. The blow fell particularly heavily on the class of men called "Rentallers and Kindly Tenants", whose origin, says Walter Ross, was the same as that of the copyholders of England. The nobility of Scotland were not slow to appreciate the fact that by feuing their lands at enhanced rents, they could obtain a far greater return from their estates than

under the comparatively easy terms to the tenants which prevailed under the older tenancies.

The process of converting land held under "kindly tenancies" and similar tenant holdings into feus had, indeed, already begun before the Reformation. To quote Walter Ross, "For some time previous to the Reformation, the Churchmen, foreseeing the storm that was gathering around, feued, sold, and disposed upon so much of their land as they conveniently could".⁽¹⁾ The King's rentallers were also brought into line with the rentallers of the nobility and the Churchmen by the Act of 1587, c.69. Only the tenants of the four towns of Lochmaben escaped the course of events which overtook the rest of their fellow tenants.

Faced with ejection from their holdings, which they had in many cases occupied from time immemorial, and with the unsympathetic attitude of the Courts, the tenants were forced to acquiesce in the new terms imposed on them. These new feuars, who had thus ample cause to meditate on the dangers which beset possession of land without heritable title, were thenceforth, although from different motives, converts, along with their superiors, to the adoption of

(1) Lectures, II., p.480.

any legislation which would help to place their titles beyond any challenge.

The ranks of those people in the 16th century who were anxious as to their title to land must further have been augmented by the addition of those feuars who had feued from the Magistrates of Royal Burghs. According to the Report of the Commissioners of 1835, there was no dilapidation of the "Common Good" of Royal Burghs prior to the 16th century. With the disappearance, however, of inspection by the Chamberlain of burghal affairs, a salutary check on the disposal of the common good of Scottish Royal Burghs was lost, and in the 16th century the Burghs sought and obtained licenses to convert short leases, which they had power to contract, into heritable estates to be held in feu-farm - a faculty which was denied to them under the Acts of Parliament originally applying to feuing of land.⁽¹⁾

However, feus out of the former Church lands were probably the cause of most of the confusion which shrouded titles to land in the latter half of the 16th century. In one recorded case a party whose claim to land rested on a title from the King, granted after the date of the Act of Annexation, was

(1) General Report of Commissioners on Municipal Corporations, 1835, p.13. Theodora Pagan: Convention of Burghs, pp.105-8.

confronted by another party with a title to the same land, purporting to have been granted before that Act and confirmed by the King subsequent thereto.⁽¹⁾ By another case - the circumstances being almost analogous - we learn that the validity of the titles of 88 feuars of the estate of South Ferry of Portincraig was challenged.⁽²⁾

In justice to the Crown it must be said that it endeavoured to do all within its power to safeguard the rights of feuars claiming under titles granted before the Annexation Act.⁽³⁾ Every opportunity was given to feuars to produce their titles for confirmation; nevertheless the assistance of the Crown could not have been of any great advantage to those genuine feuars who, from one cause or another, lacked their title-deeds.

All told, the effects of the Reformation together with the development of feuing revealed themselves by the existence of a very large number of proprietors of land in the latter half of the 16th century who were by no means assured as to the security of their possessions. The state of mind of

(1) R.P.C. Vol.5, 1st series, pp.106-7.

(2) Ibid., p.124.

(3) Ibid., pp.544-5.

these people was probably not eased by the general lawlessness of the times, a subject which is constantly referred to in the current Privy Council Records.

When we look back on these events, the motives which inspired the passing of the two Acts of 1617, c.12, and 1617, c.16, stand out quite clearly. The two Acts dovetailed with each other. Looked at from a political standpoint, these enactments may be said to have had as their purpose the stabilisation of the state of title to heritable property, as finally established by the repercussions of the Reformation. The one Act set a definite time limit, beyond which no enquiry could be made into the source of a right to land, and the other ensured that thenceforth only those transactions which came to the knowledge of the public would receive the protection of the state.

Whatever we may think of the character of King James VI. in the capacity of a private individual, the fact, however, remains that, ignoring his excursions into the realm of dogma and religion, he showed real abilities as a legislator.

To a much greater extent in a despotic form of government than in a democratic one, legislation exemplifies the mind of the head of the state. During James's reign a great deal of attention was given to the development of industrial enterprises and

inventions and the improvement of administration. One feels, therefore, that he must be given some credit for the introduction of the above enactments, as being in general line with his policy to promote legislation which would remove any shackles on the future development of the country. In truth, the King showed himself to be zealous for the improvement of Scotland, and his statement to the Parliament of June 1617 - the one which witnessed the introduction of the Land Registers - that his great desire was to see all necessary reforms passed for the good of the people, in reality reflected his aims and purposes. In some respects, perhaps unknown to himself, his policy was an embodiment of the aspirations of the middle class and intelligentsia which emerged from the ashes of the Roman Church. Hume Brown⁽¹⁾ drew the correct conclusion when he stated that "in the period before the reign of Mary the political problem of the country had been the relation of the Crown to the nobles; in the period to come it was to be the relation between the Crown and the educated opinion of the nation as represented by the merchants in the towns and the smaller landowners in the country."

(1) Op. cit., Vol.II., p.117.

Although the lands of the dispossessed Roman Catholic Church for the most part fell into the lap of the nobility, the middle-class of Scotland were considerable gainers by the Reformation. Prior to the Reformation the ecclesiastical courts of the "Auld Kirk" assumed such a wide jurisdiction that there was very little business left to be dealt with in the ordinary civil courts. When attention is also drawn to the fact that before the Reformation the Notary, through whose hands passed most of the every-day business of life, was a churchman or a dependent of a churchman, it will be readily appreciated that the eclipse of the Auld Kirk connoted not only a transformation of the spiritual life of the people and the territorial adjustments we previously commented upon, but also a new departure in the administrative organisation of the country. In the change occasioned in the administration of the country, the middle-class perceived a rich field for its energies. For this reason we find cause for the belief that the introduction of the Land Registers, which was part and parcel of the scheme for the modernisation of the country, must have been doubly welcome to the middle-class. Taken by themselves the Land Registers may not have furnished opportunities for employment for members of that class in any

considerable numbers, but as part of a scheme for re-organising the business life of the community, the substitution of a system of state registration for the Notarial private system was in trend with the transfer of the rights and privileges of churchmen and their dependents to a new class of professional laymen.

Unfortunately the records of the period afford us little direct evidence in support of these latter contentions. There was no Hansard to come to our aid. The Parliament of 1617 had not yet acquired that right of debate, which was a later development, and which indeed arrived too late on the scene of our Parliamentary history. The Parliament of 1617 was still in servitude to the Committee of the Articles, and in this situation the attitude of the Scottish public to the introduction of the Land Registers could not be voiced. Formally, the reason put forward for the inauguration of the Registers was the prevalence of frauds. Fraud was a long standing complaint; but the deeper reasons which caused the Land Registers Act to be put on the Statute Book can be fathomed, we believe, only when it is viewed from a wider angle, namely as part of the great framework of legislation which the Reformation was responsible for, and indeed made inevitable.

One question, perhaps, still remains to be

answered. Whence came the design of the Land Register Act of 1617? Did our legislators work out the main principle of the Act by themselves, in abstracto, so to speak, or, what comes to the same thing, do we owe the invention of the registers to superhuman sources, as Sir George Mackenzie evidently meant to imply? Did our ancestors borrow from other countries, or were they partly borrowers and partly innovators?

If we are to accept the proposition that the idea of the land registers was entirely home-bred and that our legislators did not draw on outside sources at all, then we must be prepared to close our eyes to very suggestive evidence to the contrary. Sir George Mackenzie's belief does not lead us very far. He lived in an age when the science of historical criticism was undeveloped and its methods were therefore not within his command.

The observation made by Sir Thomas Craig that we were stimulated to set up land registers by our knowledge of the English Statute of Enrolments⁽¹⁾ certainly deserves more serious consideration. If his statement were well founded, then our Act might be likened to the ripened work of pupils who had

(1) Sir Thomas Craig: Jus Feudale I. d.XI., sec.30; Translation by Lord Clyde, Vol.I., p.197.

outstripped their teachers. But there is undoubtedly some objection to Sir Thomas's view, because we have no supplementary evidence to indicate that England's unsuccessful experiment played any part in the deliberations of the framers of the Scottish Act, or that they were influenced by it in any way. Nevertheless the fact of the English experiment not being unknown to Sir Thomas Craig, and possibly to more of his contemporaries, is very significant.

So far as knowledge of what was taking place in other countries is concerned, we have seen that an incomplete start had already been made with land registration in other Continental countries, particularly France and Denmark, before our land registers were inaugurated. With one of those countries, namely France, we always had close political relations, and intercourse between the two countries was quite common. It is possible that the attention bestowed by Frenchmen of the 16th century to the question of land registration, awakened an interest in the subject on the part of Scotsmen. In any event it is difficult to believe that none of these developments exerted any influence on the minds of thoughtful Scottish jurists in the latter half of the 16th century. Indeed, one is irresistably drawn to the conclusion that the very excellence and completeness of our Act

of 1617 is an argument in itself for the theory that our Act is the successful culmination of trial and experiment tried elsewhere.

Dr Maitland Thomson has no hesitation in saying that registration came to us from abroad, but suggests we were not entirely imitative.⁽¹⁾ On the whole, Professor Bell summed up the situation very well and aptly expressed our sentiments when he stated "that we shall not be oversparing to our ancestors "for having had the good sense to recognise what was "valuable in the institutions of any other country "and to give us the benefit of a good and sound system "wherever they could fall in with it".⁽²⁾

(1) Op. cit., p.86.

(2) A. M. Bell: Lectures, 3rd ed., p.662.

CHAPTER 2.NOTARIAL SYSTEM AND LEGISLATION ON REGISTRATION
PRIOR TO THE ACT OF 1617.Section I. NOTARIAL SYSTEM.

When discussing the old Notarial Protocols, one must be careful to avoid the impression, which the Statute Book is apt to give, that the Notarial System as practised in Scotland was an unmitigated evil, and that the Registration Act of 1617, therefore, was an Act of despair rather than a well thought out scheme for placing the security of land rights on a more scientific basis. As we shall learn later, there were many people in Scotland at the beginning of the 17th century who were quite decidedly of the opinion that the Notarial System of preserving land rights suited them best.

The Notarial System will be seen in a much better light if we ask ourselves what might have been the plight of our predecessors if that system had not been in operation at all. Had Scotland withstood the influence of this institution of Roman law, then might it not have been said of her as it has been said concerning England, "the almost universal

"existence of the notarial system operated to exclude
 "altogether much of that uncertainty and liability to
 "fraud which exists in this country."⁽¹⁾

Under the Roman Law a citizen could save all dispute as to the verification of a document, by depositing it in the hands of the magister census at the capital or in those of the municipal magistrates in lesser centres. Copying this example, a distinction was made in the Middle Ages between private documents, which were merely drawn up in the presence of witnesses, and public documents, which were deposited in the public archives or drawn up in the presence of a Judge or Bishop.⁽²⁾ But as "a Notary was always attached both to the Judge and the Bishop, it was before him that such documents were usually drawn up, and as such Judge and Bishop had considerable voluntary jurisdiction, agreements between parties were often made before such notaries in their official capacity".⁽³⁾ It appears, however, that from about the 12th century, Notaries in France aimed

(1) J. J. Park: Lectures on Systems of Registration and Conveyancing, p.24 of Pamphlet printed in 1833.

(2) Richard Brooke: Office and Practice of a Notary in England, 5th ed., p.3.

(3) Ibid.

at independence, and commenced to draw up on their own behalf that which they formerly used to do in the capacity of Judges' or Bishops' Scribes.⁽¹⁾

This development must have been welcomed by the average citizen, for it enabled him to make his own private arrangement for attendance at the notary's office, probably at much smaller expense. The tendency of the Notarial System to encroach upon the lord's court also made itself felt in Scotland. By James III.'s time the Notary's Court definitely displaced the Baron's Court and the authentic record of the observing of symbolical delivery on the lands under the notary's sign and subscription superseded the archaic ceremony of attendance at the Baron's Court with its reliance on the memory of witnesses.⁽²⁾ Were it not for the considerable prestige enjoyed by the notary, this change would have been impossible. It was made possible by the importance which medieval society, under the guidance mainly of the Church, attached to the attestation of the notary. So much reliance, indeed, was placed on his integrity that under the Canon Law the testimony of one notary was made equal to that of two witnesses - *Unus Notarius aequipollet*

(1) Dr Thomson: Public Records of Scotland, p.88.

(2) Ibid., pp.94-5.

duobus testibus.⁽¹⁾ Under our old statutory law, where a party to a deed could not write, the subscription of a notary was an essential (1540, c.37. A.P.S. ii. 377), this requirement being extended later on to the subscription of two notaries and four witnesses, when faith in the honesty of notaries had been shaken (1579, c.18, iii. 145).

Turning to the question, from whom did the notary derive his authority, it would appear that the earliest members of the profession were appointed by the Popes and the Holy Roman Emperors. Founding on their claim to universal jurisdiction in the spiritual and material affairs of the whole Christian world, these potentates exercised the right to appoint notaries, either directly or through delegation. Notaries thus appointed pursued their calling in every country. Those who were doubly qualified were entitled to practice in any part of the world. Bishops also had a power of nomination to the office, but their nominees might practice only within the dioceses of their patrons.⁽²⁾ Like the Bishops, in France, communes and Lords, who had seignorial jurisdiction, created notaries public with right to frame

(1) Edmund Gibson's *Codex Juris Ecclesiastici Anglicani*, 2nd ed., p.996.

(2) Dr Murray: *Legal Practice in Ayr and the West of Scotland in the 15th and 16th centuries*, pp.7 and 8.

and execute instruments within the limits of their respective domains. Giry says: "A partir de la "seconde moitié du XII. siècle et pendant tout le "moyen âge la tres grande majorité des actes privés "du midi de la France furent donc rediges par des "notaires publics, seigneuriaux, épiscopaux, commun- "aux, royaux, imperiaux ou apostoliques."⁽¹⁾ In Scotland, however, there is no record of the creation of notaries public by bishops or nobles.⁽²⁾

Papal notaries continued in their office long after imperial notaries had ceased to function. The reasons for this are not far to seek. So long as the spiritual domination of the Roman Catholic Church was acknowledged, its legal institutions were tolerated; only when the power of that Church was no longer recognised did these institutions come to an end. The case with imperial notaries was quite different. As the conception of nationalism grew, and national states established themselves as sovereign powers, the foisting of imperial notaries on countries outwith Germany was regarded with disfavour. Accordingly, imperial notaries were dethroned at a much earlier date than were their colleagues of

(1) Manuel de Diplomatie, p.829.

(2) Wm. Angus: Notarial Protocol Books, p.291.
Sources of Scots Law, Stair Society, 1936.

ecclesiastical origin. The prerogative of the Emperor to create notaries for the kingdom of Scotland was brought to a close in 1469, and in England in 1320.⁽¹⁾ One result of the monopoly of the Emperors and Popes of creating notaries was that uniformity obtained in the practice of keeping protocols throughout Europe and, save perhaps for local variations, the form and art of writing protocols was reduced to a common formula in a common language. The rules laid down for the keeping of protocols, as ordained in the Constitution of the Emperor Maximilian issued in 1512, were, "That every notary have a protocol, and that he keep it carefully, and write it in order with his own hand all the Acts and Instruments verbatim, to which he was a notary, and that he keep and preserve a register of them, so that recourse may be had to the protocol or register, both in order to supply instruments that are lost either before or after the notary's death, and likewise to clear any doubt or question that may arise from them."⁽²⁾

We do not find any Statute in Scotland prescribing the order and arrangement in which notaries were

(1) Dr Thomson, *op. cit.*, p.89.

(2) Quoted from Dr David Murray, *op. cit.*, pp.18-19.

to keep their protocols, but our practice differed in no respect from the method above prescribed.

The date of the first appearance of notaries in Scotland cannot be fixed with any degree of certainty. Dr Maitland Thomson provides us with information which indicates that private notaries existed in Scotland from so early a period as the first half of the 13th century. The same author inclines to the view that imperial notaries put in an appearance in this country before apostolic notaries; and he also states that the Calendar of Papal Registers, issued in the Rolls Series, shows that the earliest instance, in England and Scotland, of a faculty granted by the Pope to a bishop to create a notary public took place in the years 1279 and 1287 respectively. Evidently no one has seen a Notarial Instrument in Scotland of an earlier date than the year ~~1291~~ 1287. In the absence of evidence to the contrary, we may presume that notaries were not numerous in this country in the 14th century, but in the 15th century their numbers must have been considerable because malpractices of the craft were sufficiently widespread to attract the notice of the Legislature early on in the 16th century.

Prior to the Reformation the calling of notary

in Scotland was confined to Churchmen,⁽¹⁾ but it is as well to mention that there is a reference in the Act of 1540, c.11, to lay notaries. That notaries were drawn from a limited circle was, of course, due to the fact that the clergy were ^{almost} the only members of society who were versed in the Latin language. After the Reformation, when the vernacular came into its own, and the intrusion of the clergy in matters of this kind was no longer considered desirable or necessary, the clergy were deprived of this privilege, and, save for the drawing up of testaments, they were kept to the duties proper to their profession (1584, c.6, iii., 294). By the earlier Act of the year 1567 (c.9, iii., 24), the office was barred to applicants who were not of the new faith.

The upholding of the prestige of the Scottish Crown was, no doubt, the chief motive for the passing of the Act of 1469; but apart from this consideration, this Act served a very useful purpose in so far as it closed one avenue by which notaries might enter the profession. Until then, and even afterwards, the sources to which a notary might ascribe his appointment were so obscure that it was often difficult to tell whether a person styling himself notary was

(1) *Ars Notariatus*, 1740, pp.22-24.

really entitled to the benefit of this claim. Under these circumstances it was not surprising that the country was troubled with unsavoury characters practising the art, "among whom there were doubtless not a few who had assumed and were exercising the office "without any authority whatsoever".⁽¹⁾ Such "self-styled notaries" evidently could exercise the calling with impunity for a whole lifetime, and it was deemed advisable not to probe too deeply into the bona fides of many notaries who might otherwise have had their acts and writings condemned, to the great loss of those who had employed them. In consequence of this state of affairs, all that was required to be proved to make a notary's protocol receivable in evidence after his decease was that he was "famous legal", which presumably meant that he was widely accepted as having been in practice.

If we are to take the older Statutes at their face value, fraud among notaries was not uncommon. Many Statutes were passed for the punishment of fraudulent notaries and the users of false instruments.⁽²⁾ The punishments prescribed for such notaries were, one would have thought, sufficiently

(1) Rodger's Feudal Forms, p.162.

(2) 1503, c.8, ii, 242; 1540, c.15, ii, 360;
1551, c.17, ii, 487; 1555, c.18, ii, 496.

drastic to deter would be breakers of their trust, as they consisted of "proscription, banishment, and dismembering of hand or tongue". But most writers seem to agree in thinking that these measures did not bring about the desired improvement. Certainly, there was plenty of opportunity for fraud. The system lent itself to it. In a community in which illiteracy predominated, it must have been a simple matter to forge deeds, to alter, suppress or ante-date them. In some cases, however, people suffered not so much by the wilful dishonesty of a notary but rather through his lack of professional skill.

But quite apart from cases of fraud, there was inherent danger in the assumption that special sanctity attached to the instrument of the notary. Provided it was drawn up and executed in a formal manner the Notarial Instrument at one time was title by itself, although it rested on no surer foundation than the bare unsupported testimony of a notary public. The most dangerous fraud of all, however, and one which could not be prevented until registration was introduced, was the one whereby Charters with Precepts of Sasine to be holden de se were wont to be given out to relatives or confederates on pretended sales. Sasines on these charters were expedite with

all due solemnity, the granters, however, retaining natural possession. Thereafter the property was alienated to bona fidei purchasers for value by Charters containing Precepts of Sasine to be holden a se. Then, when the genuine purchaser proceeded to take up possession, the holder of the private sasine, who was as the law then stood preferred to the property, revealed himself. A praiseworthy attempt was made by the Act of 1540, (c.23, ii, 375) to put a brake on this particular species of fraud. That Act did much to mitigate this particular evil, but could not entirely suppress it.

Nevertheless, when dwelling on the subject of the misdemeanours of notaries of the past, we must not allow ourselves to be carried away by exaggeration. While it is matter of common knowledge that the standard of professional conduct was then not nearly so high as it is to-day, yet the strong reactions exhibited by the country at large, even in those days, to fraud, showed quite plainly that whatever might have been the failings of individual notaries, there was a considerable leaven of honesty in the profession as a whole. From Pitcairn's Criminal trials we gather that between the years 1555 and 1616 there were nine convictions of notaries for crimes

connected with the falsification of instruments. This information certainly points to the existence of notarial misdeeds, but the crimes themselves are not represented by such overwhelming numbers as to justify any positive opinion that fraud was really carried out on such a scale as to undermine all confidence in the acts of notaries.

Nowadays, e.g. in the sphere of Company Law, we frequently run across Acts of Parliament designed for the prevention in the future of frauds which are known to have been perpetrated in the past; yet the language of these Acts is quite matter of fact and entirely free from fulmination. Herein lies one important difference between modern Acts of Parliament and our older Scottish Statutes, and this should be borne in mind when passing judgment on any of our ancient institutions.

So far as concerns the appointment of notaries and their qualifications, it is evident from our older statutes that this problem afforded much food for thought in early times. Our legislators first addressed themselves to this matter in the Act of 1469 (c.6, ii. 95). As has already been mentioned, by this Act King James made manifest his right to appoint notaries within his realm whose deeds would

have full faith in civil contracts. Those appointed were required to satisfy the Bishop within whose diocese they resided as to their fitness and character before they could take up office. By the same Act recognition was withheld from imperial notaries unless they submitted themselves for examination by the Ordinary, followed by the King's approval. A distinction, however, was made with regard to Papal notaries, these being given full recognition without any further examination. By a later Statute (1503, c.8, ii, 262) the above regulations were re-adopted, but now the Crown took care to have its say in the appointment of all notaries, without distinction, since after examination by the Bishops and their officials notaries were to be sent to the "Kingis hienis, quhilk sall depute certane personis to examyn them, and gif thai be ganand to mak them regale gif thai be not made regale of befoir". The determination of the Crown to have all notaries brought under its control was again made plain by the Act of 1540, c.11 (ii, 359). Another step in this direction was taken by the Act of 1551, c.19 (ii, 487), the duty of undertaking the final examination of notaries now devolving upon the Lords of the Council. Judging from the text of this latter Act, it was apparent that

spiritual notaries at this stage were under the command of the Bishops, while temporal notaries were subject to the command of the Sheriff. Thenceforth, as the clouds of the Reformation begin to gather, clerical co-operation in this sphere of administration disappears, and the mediation of the Bishop and his ordinaries was brought to an end (1555, c.18, 1563, c.16 & 17 (ii, 541-2)). But complaints about the conduct of notaries did not cease on this account, for in the Act of 1587 c.29 (iii, 448-9) the old familiar tale of the "great fraud used be diverse "Notaries and the evil of admitting them with over "slender tryall taken of their knowledge and qualification" is once more taken up. This Act made a bold attempt to cure the evil at its source by prescribing an examination for notaries in the art of framing writs.

As to the system proper, granting its original defect of entrusting to private hands what should have been left to the care of the State, there was then much to be said in its favour. The protocols of the notaries contained either full copies or drafts of the instruments extended by them, to which their employers could have recourse where originals had been lost or destroyed. Where the notary and

the witnesses to an instrument which was lost or destroyed were alive, a fresh copy made out from the one in the protocol book and re-attested by them was received as equivalent to the original (Ramsay, 2nd Jan. 1678 M.13553). Where the notary was dead but his Protocol Book was intact, an extract of his protocol could likewise be made equivalent to the original instrument, but in this case a process of law called a judicial transumpt had to be carried through.⁽¹⁾

In a certain sense notaries' protocols, collectively, formed a sort of register for the preservation of the tenor of sasines. In earlier times, indeed, the Protocol over-ruled the extended Instrument where a discrepancy between these two was revealed.⁽²⁾ This may have been due to the fact that the protocol was then a more complete record of a transaction than it was in later times.⁽³⁾

Against what can be said in favour of the Notarial system must be placed the severe criticism that it did not serve the interest of the public as a whole. The Notary's Protocol was, of course, a

(1) Stirling v Monteath, 1566, M.12447. See Protocol Book of Sir Robert Rollock, edited by William Angus, Instrument No.46, for narrative of proceedings in Judicial Transumpt.

(2) Balfour's Practicks, p.370.

(3) Dr Murray, op. cit., p.20.

private book, and it remained such, without being subject to any kind of judicial supervision, until the Act of 1555 (c.18) ordered them to be produced before the Council so that their leaves might be numbered and the blanks marked on admission of notaries to office. Moreover, on the death of a notary his Book ran the risk of loss, defacement or destruction. When the conjunction of any of these occurrences took place, with the loss of original instruments, many persons affected were in a quandary. It was probably more with a view to safeguarding the interests of such people rather than with the object of setting up a crude form of register that the Act of 1567 (c.87, iii, 44), which contained the salutary provision that the Protocols of deceased notaries should remain in the custody of the Sheriff of the Shire, and those within Burgh with the Provost and Baillies, was passed. Actuated by the same purpose, eighteen years earlier a Provincial Council of the Church had decreed that the books of notaries were to be deposited with the official of the diocese. The Act of 1567 was superseded by the Act of 1587, c.29, which substituted the Clerk Register for the Sheriff as the custodian of deceased notaries' protocols. This Act also made provision for the payment of compensation

by the Lord Clerk Register to the representatives of a deceased notary for the protocols which were taken out of their hands, but evidently this proved to be too expensive a project, because it was discharged by the Act of 1617, c.22 (iv,549) and, instead, payment to the representatives of a fee on each writ extracted was directed to be made. The compensation which was offered did not satisfy these heirs; possibly also they resented the idea of official expropriation of their private property. At any rate these Acts attained very meagre results. (Falcon & Tours, 1588, M. 15785; Lauder & Home, 1622, M. 15787.)

As a means of securing publication in land rights the Notarial ^{Protocol} Instrument lost all importance after the Registration Act of 1617.

It remains to be said that it is perhaps easy for, us who are in the fortunate position of being able to survey the history of completion of title from the pedestal of registration, to pass judgment on the shortcomings of the Notarial system. Viewed, however, in its proper historical perspective, that system cannot be said to have been a bad one, for the simple reason that in its day it served the requirements of Scotland and, let us not forget, the whole of contemporary Europe. It broke down in Scotland

when it was overtaken by the march of events which reduced even greater and more vital institutions to dust.

Section II. LEGISLATION ON REGISTRATION PRIOR TO
THE ACT OF 1617.

INTRODUCTORY.

It seems to have been an almost universal rule in all countries that the first stages of land registration should consist of short notes of the contents of deeds.

Brickdale divides the course of development of land registration into three stages: the first stage, when elementary short notes of a transaction are made by a public or quasi-public authority; the second stage, when transactions are embodied in written instruments, which are copied into the public register books by way of duplication or memorials, without any attempt to summarise their effect; and the third and last stage, registration of title.⁽¹⁾ We in Scotland faithfully reproduced this first stage in our

(1) Sir C. F. Brickdale: Methods of Land Transfer, p.18 et seq.

earlier Acts of Parliament on registration. Furthermore, in harmony with the early development of registration on the Continent, registration in Scotland, when first introduced, was not authorised on a whole-sale scale, embracing all classes of writs, ^{relating} to heritage, or affecting the rights to land of all classes of society, but was limited in scope, either as to the nature of the transaction or the territorial status of the person.

(a) Reversions.

A first beginning was made with registration of land rights in Scotland by the Act of 1469, c.3 (ii, 95). The opening words of the Act, which characterised the mode of selling land by Charter and Seisin and the taking of separate Letters of Reversion as a recent invention, deplored the practice of certain wadsetters who betrayed their trust by selling lands under pledge to them. To protect the rights of Reversers the Act did two things. First of all, it made letters of reversion real against singular successors, and in the second place "because sic Reversiones may of case be tynt, our Sovereigne Lord sall mak the said Reversiones to be registeret in his register if it be requierit the which

register shall have the same force as the principal Reversion were schawing for the tyme". Looked at from the standpoint of registration, the interesting features of the Act are that registration was not made compulsory, and that, even when effected, it was to be for preservation only. Whilst on this subject we may mention that Mr Ross⁽¹⁾ pointed out the error of Sir George Mackenzie that letters of reversion were made real rights by registration under this Act. The reference in the Act to letters of reversion as being a recent invention is a reminder to us of the prominent place of the wadset in ancient conveyancing. This type of deed, although appearing to meet the case of impignoration only, was converted into a device for effecting an out and out sale. By employing this form for a covert sale, any claim on behalf of the Superior for forfeiture of the fee by recognition could be successfully met. In fact, it is believed that the wadset in its original form was employed in sale only, and that it only emerged later as a form of security for money lent.⁽²⁾

Prior to the invention of separate letters of reversion, the right of reversion was embodied in

(1) Lectures, ii., p.336.

(2) Duff's Feudal Forms, pp.257-8.

in gremio of a grant and reversers had "nothing in their hands to show for their lands or to direct the mode of redemption". Now that the wadsetter's right was made real by the omission of the reversion in his deed, reversers, for the reason stated in the simple language of the Act of 1469, soon found themselves in a worse quandary. Such being the case, it was only natural that concern was felt for a class of people who were driven by dire need to offer an amount of land as security out of all proportion to the temporary relief they obtained in return. This fact may help to explain why letters of reversion were specially singled out in this early Act as requiring a novel kind of protection, to the exclusion of all other writs.

In that which followed, it happened that the first part of the Act which declared letters of reversion good against singular successors did as much harm as good. It protected reversers, but it exposed singular successors who bought on the faith of wadsetters' unqualified titles to the risk of meeting a demand for the return of the property from reversers whose rights were undisclosed to them. One would have thought that purchasers could have protected themselves against this contingency, since the

wadsetter's grant behoved to be held either of the reverser's Superior or else of the reverser; and that either of these contingencies afforded them an opportunity of learning the true state of affairs. Nevertheless, cunning minds found a way of deceiving purchasers. This trouble was not effectively overcome until the Registration Act of 1617 brought these letters of reversion within its scheme of compulsory registration, the previous Acts dealing with registration of reversions, passed in the years 1555 (c.2, ii, 492) and 1567 (c.38, iii, 40), not having proved successful.

(b) Publication of Sasines.

Instruments of Sasine were not made the subject of registration until the year 1503 (c.35, ii, 253), and even then the convenience of the lieges was not the end in view.

Effective control of the Revenue belonging to the Crown was always a difficult problem in those days, and it was hoped that a check might be made on the collection of the superiority dues owing to the Crown if the Sheriffs and Stewards of Scotland, to whom Precepts issued from the Chancery were directed, and who received these payments, were compelled to

enter a note in their Books of the dates of the Sasines given out by them. Hence the passing of this Act. The books of the Sheriffs were employed as the medium to carry this project through, and it is important to note that the same agency was used in all future enactments dealing with the publication of sasines and other writs in heritage right up to the Secretary's Register. The next Act to follow the one of 1503 added the requirement of noting the names of the lands in the Court Books, but apart from this it effected no alteration on the previous Act (1540, c.14, ii, 360; ratified by Act 1587, c.50, iii, 455). Its provisions were directed at the class of deeds specified in the original Act. Its closing words, however, deserve attention. It ends with the sentence "That the same (i.e. the Sheriffs' books) may remayn in the Register sua that the king's grace may know his tennents and all others having recourse thereto". This seems to indicate that the doctrine of publishing sasines was now beginning to permeate the minds of the advisers of the Crown. But, as already stated, these enactments were very limited in scope. Moreover, as the duty of obedience to the Acts was not imposed on the King's vassals, but solely on members of the administration, to wit, the Sheriff or the Sheriff's clerk, there was no room

for the penalty of nullity for non-registration.

The omission of writs belonging to subordinate vassals from the scheme of registration obviously required a remedy, and this was supplied by the Act of 1555, c.21 (ii, 497). From the wording of the 1555 Act, "that the takars of sesing ather air vassal or subvassal within zeir and day present his sesing to the Sheriff Clerk of the Schire quhair the landis lyis he to insert the samin in his court books at the leist the day moneth of the giving of the said sesing, the name of the landis contenit in the samin, the name of the notar and witness containit thair intill", it is obvious that the lieges were given ample time to conform with the Act, a fact which gave many opportunities for creating mischief; that important writings affecting land were excluded from registration; and also that these abbreviated entries could not yield any information as to any burdens with which lands may have been encumbered. The chief defect, however, of all the Acts referred to under this head lay in the absence of any penalising clause for non-registration. Under these circumstances it is not surprising that these measures made little headway.

The records of the Sheriff Court covering this period are very ill preserved; so we are not in a

position to state definitely that these Acts were entirely ignored, but it is significant that Craig⁽¹⁾ who was well qualified to speak on this matter, said that in his time the Act of 1555 was almost completely forgotten. Of the 1587 Act, Bankton remarks that "it bore no penalty and so it seems had gone into disuse or perhaps had never taken effect".⁽²⁾

In the long run, however, it transpired that the labour expended on these measures was not so much wasted effort. Much better wisdom was displayed in an Act of the Convention of the Estates in July 1599, converted into an Act of Parliament in November 1600, which set up the Secretary's Register. Although the Secretary's Register enjoyed only a brief existence, it left us a model on which was fashioned the more lasting structure set up by the Registration Act of 1617. The Act of 1599 ordained the registration of all Instruments of Sasines, Reversions, Bonds for giving Reversions, Discharges and Assignations of Reversions, Intimations of the same, except those registered in the Books of Council and Session and also excepting Sasines of burgh lands held in free burgage, within forty days after their date, in a Register annexed to the Office of the Secretary of State, failing

(1) Jus Feudale, 2, d.7, 23.

(2) Bankton, ii. 3, 34.

which they were declared to be null. Extracts of writs registered were to be given out which were to have the same faith as the originals, unless the same were offered to be improved "by way of action or exception". The ratifying Act of 1600 added Regresses, Renunciations of Wadset and grants of Redemption to the above list.

For the purposes of the Acts Scotland was parcelled out into 16 different districts, each of which was to contain a register kept by a deputy "of guid-some literature and qualification" appointed by the Secretary of State. These deputies were instructed to book each writ within 24 hours of its presentation for registration and to re-deliver the same to the presenter with a note of the day, month and year of its registration and the leaf of the book wherein it was engrossed. The compilation of a Minute Book was not prescribed by these Acts, but each deputy was ordered to affix "on some public place of the town quhair he remanis" a roll of the writs presented to him for registration in the half year preceding "that the same may come to all parties knowledge".

The penalising clause of these statutes calls for special notice. As worded there it went too far and ran counter to all principles of law. If this drastic decree had remained on the Statute Book for

any length of time it would have wrought havoc to well founded rights. For example, under this clause a granter would have been able to deny his own grant, a state of affairs which could not be justified on any ground. Fairness also dictated that where you had two sasines unregistered, and therefore two parties guilty of the same neglect, the infeftment prior in date should take precedence over the later one in date. This error was not reproduced in the Act of 1617 but even there the phraseology was not perfect, so little so, in fact, that it was not until well on in the last century before the paramount issue whether an infeftment unregistered exhausted the precept of sasine or not was finally determined beyond all manner of doubt.

The defect, alluded to, of the 1599 Act was, nevertheless, a matter which could easily have been remedied and had the Secretary's Register not been unceremoniously brought to an end by an Act of Convention at Edinburgh on 27 January, 1609, which received the ratification of Parliament on 24th June following, this no doubt would have been put right. What was not a small matter, however, was the fact that many sections of the public were not, as yet, amenable to the change. To an ignorant public, which Scotland evidently did not then lack, the announcement that

private deeds would make no faith unless registered in the books of a government office must have come as a bombshell. Again, the coming of the new system minimised the value of the notary's protocol for his client, resulting in loss of income to the profession. The disgruntled notaries retaliated in the only way open to them, and that was by boycotting the register, and possibly encouraging their clients to do likewise. Obstacles of this nature militated against the successful working of the Secretary's Register, although they did not entirely reduce it to a dead letter, since it was kept in most of the places appointed under the Acts until suppressed.⁽¹⁾

So far as the Crown was concerned, whatever may have been its feeling towards the end, in the beginning it strove hard to ensure obedience to the Acts of 1599 and 1600. Any doubt on this score is removed by the evidence of the records of the Privy Council which go to show that on no fewer than three occasions between the years 1600 and 1602 the Council took quite creditable steps to redeem the Acts from failure. One measure of the Privy Council was to order a proclamation to be made to notaries to exhibit every quarter to the depute keepers "ane just

(1) M. Livingstone: Guide to the Public Records of Scotland, p.168.

cathologue and scroll of writs appointed to be inserted in the register", failure of any notary to do so being visited with deprivation. The Court of Session also lent its aid by passing the Act of Sederunt of 6th January, 1604. This Act was interesting in respect that it fully recounted the obstacles encountered in the execution of the Acts, one being the excuse put forward by inhabitants of burghs and regalities that they thought they were covered by the exemption granted to inhabitants of free burghs. Evidence of the widespread notion that notaries were sabotaging the Acts is also revealed by the enactment contained in this Act of the Court that all makers of writs were to close their deeds with a clause "ordayning the same to be registrat within 40 days" under certification of deprivation of office and under penalty of costs to their clients for any damage sustained through such failure. Seemingly notaries paid scant attention to this threat also, "for very few sasines, if any, after the date of this Act contained such a clause".⁽¹⁾

On reflection it is quite clear that strong opposition, much of it hidden and much of it openly expressed, was directed against the Secretary's Register.

(1) John Russell: Theory of Conveyancing, pp.198-9.

Reading between the lines of a letter addressed by the King to the Privy Council on 9th January, 1609,⁽¹⁾ one may safely surmise that the mind of the monarch on the subject of the retention of these Acts was being made up for him by important personages who stood high in his favour, and who evidently found it quite an easy task to bias him against a measure which was under the superintendence of a Minister (Lord Balmerino) who was in disfavour with him on account of the discovery of a compromising letter for which the Secretary could not evade responsibility. On the other hand, the official reason given for the suppression of the Acts was the "just grief and discontentment which the subjects of the kingdom of all designs and ranks has conceived upon the erection of that unnecessary register called the register of the secretary which was considered as serving for no other use than to acquire gain and commodity to the clerks, keepers thereof, and to draw his subjects to needless and most unnecessary trouble, fascherie and expense". Unhappily, the Act of the Council of 4th February, 1606, published under the title "Anent the prices of writs and Seales", the preamble of which contains a strong indictment against the extortions

(1) R.P.C., 1st series, Vol.8, p.549.

of officials in every Department of State, lends an air of great probability to the truth of the accusation levelled against the Keepers of the Secretary's Register. Therefore, it is still an open question whether it was the corruption of officials or the intrigue of certain individuals that was responsible for the abolition of the Secretary's Register.

CHAPTER 3.

LEGISLATION ON REGISTRATION OF FEUDAL DEEDS
IN THE 17th CENTURY, AND ITS INTERPRETATION
BY THE COURT.

Section I. REGISTRABLE MATTER.

From the preamble of the Act of 1617 which reads
 "considering the gryit hurt sustened by his Majesties
 "lieges by the fraudulent dealing of pairties who
 "having annaliet thair Landis and reisavit gryit
 "soumes of money thairfore, yit be thair unjust con-
 "ceiling of sum privat right formarlie made by thame
 "rendereth the subsequent alienation done for gryit
 "soumes of money altogidder unproffitable which can-
 "not be avoyded unless the said privat rights be maid
 "publict and patent to his Majesties lieges", it
 seems that the Act was originally intended for the
 benefit of proprietors only. So far was this clear
 that in 1662 it was decided that in order to take
 away apprisings, even against singular successors,
 there was no need to register a formal renunciation. (1)

(1) Lord Fraser v Philorth, 23 July, 1662, M.13548
 and 938.

The fact that the security of creditors was originally not a purpose of the Act raised some doubts early on as to whether infeftments of annual rent were entitled to the benefit of registration, or whether they were to be left to the common law. Lord Kames⁽¹⁾ seems to indicate that the latter was intended with respect to these rights. However, these deeds were ultimately brought within the scheme of registration. Sir George Mackenzie⁽²⁾ stated that the reason for their inclusion was that the term "Wadsets" embraced an Infeftment of Annual Rent, the latter being in effect a Wadset of the Rights. Against the view that an Infeftment was not an alienation of lands but rather a servitude upon them, he argued that it was an Alienation, otherwise it could not have inferred Recognition.

By the terms of the Act "regresses, bandis and "writtis for making of reversionis or regresses, as- "signations thairto, discharges of the same, renun- "ciationes of wadsets, and grants of redemption and "siclyke all instrumentis of seasing" were appointed to be registered within 60 days after their date; extracts of which were "to make faith in all cases,

(1) Elucidations respecting the Law of Scotland, pp.291-2.

(2) Observations on Statutes, 1686, p.353.

"except where the writs so registered are offered
"to be improven".

That reversions and secondary deeds derived from them should have received so much consideration in the Act was quite logical. These rights did not admit possession or infeftment, but they were made real by the Statute of 1469, c.3, and therefore good against singular successors. Their inclusion was therefore essential to the usefulness of the Act. Even so, as may be learnt from the prolific litigation which followed the introduction of the Act, the list of deeds ordered to be registered did not provide for all contingencies, more particularly so for those types of secondary deeds which grew out of variations on rights of Reversions.

The register was also incomplete in respect of the exclusion of Burgage writs, an omission for which there was a special reason, which we shall discuss in a subsequent chapter.

When the task devolved on the Court of prescribing the scope of the Statute, they attempted to steer two different courses almost contemporaneously.

On occasion the Court refused to extend the list of deeds contained in the Act on the ground that as the Act was a variation on the Common Law, it should be strictly construed. But on other occasions,

stirred by the desire to afford fuller protection to the lieges, the Court took up a more sympathetic attitude and admitted to the Register deeds which hitherto had been regarded as outwith the jurisdiction of the Register.

Thus it was found that the Act did not embrace an Order of Redemption⁽¹⁾, or an Assignment to an Order of Redemption⁽²⁾. In one case where the parties sought a Declarator from the Court as to which of two parties - a singular successor from the wadsetter, or a disponent from the heritor - had a preference to right to land, and where the question hinged on the necessity for recording a discharge, granted by the heritor, of a renunciation granted in his favour by the wadsetter which was not recorded, the Lords found in favour of the singular successor in respect that the Act was stricti juris and contrary to the old law and custom and, therefore, could not be extended to any deed but one expressly mentioned in it.⁽³⁾ In a much different mood the Court linked Obligations to grant discharges of reversions with formal discharges of Reversions, although the

(1) Sir Geo. Mackenzie, Ibid., p.354.

(2) Earl of Marischal v Keith, 29 July, 1623, M.13539.

(3) Dunipace v Olivestob, 20 July, 1675, M.13551.

latter only were specified in the Act.⁽¹⁾ Eiks to Reversions, which were also not mentioned in the Act, "being conditions adjected to Reversions", were held to be governed by the same rules that govern Reversions, and were held, like Rights of Pre-emption by a late decision in 1781, to affect singular successors if registered.⁽²⁾ A more telling illustration of the wavering attitude of the Court was the case of Assignations to Reversions. The wording of the Act "bandis and writtis for making reversiones or re-gresses, assignations thereto", was held not to include Assignations to Reversions, by an early case in 1636;⁽³⁾ but this decision was virtually overturned by a finding in 1665⁽⁴⁾ that none but registered assignations were good against singular successors. Nevertheless, even after this later decision, there was a radical difference between assignations to reversions and assignations to a Bond for making reversions; for the former could be made effectual against singular successors by intimation, whereas the latter,

(1) Turnbull v Scott, 25 Nov. 1626, M.13540.

(2) Preston v Earl of Dundonald, 20 Dec. 1781, M. 6569.

(3) Earl of Tullibarden: Dury's Decisions, p.799

(4) Begg, 5 Dec. 1665, M.6304.

in a question with singular successors, rested on registration.⁽¹⁾

The problem of the inclusion, or otherwise, of discharges or renunciations of annual rent in the category of deeds which were effectual against singular successors only by registration, presented considerable difficulty.

The decisions given by the Court on the cases brought before them had not cleared the air, and opinion among our authorities on this subject was fairly divided.

The difficulty originated from the fact that a right of annual rent under the old form was not truly a bond but a right of wadset by which a yearly interest, payable out of a debtor's lands, was secured to a creditor.

At this juncture there was therefore undoubtedly good ground for associating rights of annual rent with renunciations of wadsets which, of course, were ordained to be registered. This view appealed to the Court in 1627⁽²⁾ and in 1705⁽³⁾. A contrary view, however, was favoured in 1711⁽⁴⁾. Erskine⁽⁵⁾

(1) Walter Ross: Lectures, II., p.356.

(2) Dunbar, 23 Nov. 1627, M.570.

(3) Hope, 2 Jan. 1705, M.574.

(4) Baillie, 25 Jan. 1711, M.9990.

(5) Erskine: 2, 8, 34.

points out that these renunciations were by our former usage ineffectual against singular successors unless registered in the Register of Reversions, but this observation does not help us very much. In the same section he drew a distinction between discharges of arrears of interest, which he states were always good against singular successors without registration and discharges reducing capital.

So far as our later practice is concerned, variations in style have rendered such rights accessory to personal obligations, and they can no longer be classed with wadsets. Those, therefore, who pleaded that our later forms of Bonds might be extinguished by a mere renunciation or discharge unregistered or by payment or intromission with a debtor's rents, stood on much firmer ground.⁽¹⁾ This view, which was shared by Mr Erskine and evidently by Stair, did not find favour with Mr Duff.⁽²⁾ Fortunately, however, it has become the established rule of practice to record all discharges of redeemable rights.

In spite of these anomalies the Register was fairly complete and Stair's eulogy "that upon the whole matter no nation hath so much security of

(1) Wishart, 4 Feb. 1671, M.9978. Baillie, *supra*; but see Robison, 16 Feb. 1830, 8 S.541.

(2) Erskine: 2, 8, 34. Stair, II. 5, 11. Duff, sec.375.

irredeemable rights" was not overstrained. Why redeemable rights were not so secure the reference to the above cases may help to explain.

Theoretically the Register was defective in respect that a wadset might have been extinguished without any notice of this appearing on the record. Sir George Mackenzie⁽¹⁾ pointed out this drawback. This occurred where an Order of Redemption was used by a debtor, which Order operated an evacuation of the infetment upon the wadset. Another defect noticed by the same author⁽²⁾ was the failure to disclose a Decree against the wadsetter decerning him to grant a reversion conform to the promise made by him. This decree was valid against singular successors, although the promise itself was not. We have Walter Ross as an authority, however, for the statement that no instance had occurred of any harm having arisen from this circumstance, because reversers did not allow their titles to remain on that footing. They either registered a renunciation or made up new titles.⁽³⁾

Resignations ad Remanentiam were not brought within the scope of the Act until the year 1669 (c.3).

(1) Op. cit., p.354.

(2) Ibid.

(3) Op. cit., p.368.

This undoubtedly was a more serious shortcoming than those we have just alluded to, for a purchaser might easily have lost his purchase by the superior's acquisition of his vassal's right.

Nowadays it is difficult to find a reason which will appeal to everyone for this postponement. Stair⁽¹⁾ believed that the omission was due either to error or to partiality to superiors; but Walter Ross⁽²⁾ thought their omission was due to "their infrequency in practice". On the other hand, Duff⁽³⁾ held the view that the rule of ipso jure consolidation, which was then in force, blinded our legislators to the advantage of including them amongst the other deeds for registration.

Section II. TIME LIMIT FOR REGISTRATION.

The writs mentioned in the Act were ordered to be registered within three score days of their date. A concession was made in favour of Bonds of Reversions, which were ordained to be registered within 60 days after the Sasine taken by the wadsetter

(1) 2. 11. 4.

(2) Op. cit., II., 227.

(3) Op. cit., sec. 374 (3).

upon his wadset, presumably on the ground that as the wadsetter's right remained purely personal until he had registered his Sasine, it could be affected by any deed though not registered.⁽¹⁾ Grants of Redemption and Renunciation of Wadsets were placed on a similar footing, these being ordered to be registered within 60 days after the date of the Decree by which they are ordained "to be givin up to the pairties "having right thereto".

When the question what was the sixtieth day or final date for registration came before the Court, it was decided that such date was to be ascertained by counting from midnight to midnight and excluding the day on which the act of delivery was done as the terminus a quo.⁽²⁾

The time limit laid down in the Act was strictly adhered to. But on application to the Court parties in right of discharges of securities constituted by bonds or analogous writings were granted special permission to record them, notwithstanding the expiry of the 60 days.⁽³⁾ As these discharges were received merely as evidence of a fact and were not comparable

(1) Erskine: 2. 8. 10.

(2) See Lindsay & Giles, 1844, 6 D. p.771.

(3) See Earl of Glencairn, 1749, M.13575.

to Instruments of Sasine or Resignations ad remanen-
tiam, the Court evidently thought there was room here
 for departing from the strict rule. Apart from
 these discharges there is only one instance of the
 Court deviating from the strict application of the
 rule. The case we have in mind is one where a deed
 did not arrive in time from Shetland to be registered,
 as the ship in which it was being conveyed was driven
 out of its course as far as Norway.⁽¹⁾

Section III. PLACES OF REGISTRATION.

By setting up local registers in the localities
 mentioned in the Act, in addition to the General
 Register at Edinburgh, our legislators gave addition-
 al proof that every factor which would render the Act
 a success had been carefully weighed.

In the poor state of communications which pre-
 vailed all over Europe in the 17th century, and not-
 ably so in Scotland, the Act would have been doomed
 to failure had our legislators not shown their pre-
 ference for local registers in combination with a
 metropolitan register. Had they decided on local

(1) 1688, M.13559.

registers alone, proprietors with scattered estates would have been put to the necessity of registering their deeds in the register of each county where their lands lay; on the other hand had our legislators given us a metropolitan register only, heritors in such far away districts as Orkney would have been compelled to send their deeds to Edinburgh at the cost of considerable risk and delay.

Bearing in mind the twin factors of the density of population and economic development of Scotland of the early 17th century, the distribution of the local registers among the districts detailed in the Act was very well planned, and it was only found necessary to make a few adjustments in the future. The changes were that an office was opened for the County of Argyll, &c., at Inverary in place of Dumbarton in 1641 (c.222, V. 472), but as the clerks at Inverary became increasingly negligent in performing their duties, the branch was re-established in Dumbarton in 1673. For a short period between the years 1644 and 1657 the register for this district was kept at Glasgow. An office was also opened in Wick in 1644⁽¹⁾ for the County of Caithness; another in Kinross for the County of Kinross in 1685,⁽²⁾ and Banff-

(1) 1644, c.275, VI. 249.

(2) 1685, c.50, VIII., 489b.

shire, which was linked with Aberdeen in the Act, had a register to itself since 1656, which was kept in the county town. Again, the convenience of the inhabitants of Shetland was later met by setting up a separate branch in Lerwick in 1744, but it is as well to mention that from the years 1634 to 1672, the register was kept at Scalloway instead of Kirkwall. The Register appointed by the Act to be kept at Selkirk for the Counties of Roxburgh, Selkirk and Peebles was possibly not initiated in that town. The first book of the Register was delivered to Mr Thomas Nicolson, Commissar of Peebles, but the Register was kept at Selkirk definitely only from 1622 to 1643. The next Record volume extant commences in 1656, from which it appears that the Register was then kept in Jedburgh and continued so until 10th December, 1745. After that the Register was kept at Kelso until 31st December, 1857, and it finally finished at Melrose. With these few alterations, the numbers and distribution of the local registers remained as fixed in the Act, until their abolition by the Land Registers Act of 1868.

As stated, a great advantage of the combined system of registration was the choice of register. Where a deed comprised lands situated in two or more counties, it was to a proprietor's advantage to

register in the General Register. Besides, there was the question of completing registration within 60 days of the act of delivery, which might have been difficult, if not impossible, if the deed had to go the round of several Particular registers.

An interesting question which troubled Sir George Mackenzie⁽¹⁾ was whether an Instrument of Sasine of a Barony Estate, comprehending lands situated in different counties, was validly registered, quoad lands in the other counties, if it was registered only in the Particular Register of the County covering the place at which Sasine was directed to be taken by the Charter of Union. The question was raised but not decided by the case of Hill v Duke of Montrose (6 Sh. 1133).

Section IV. BOOKING OF SASINES.

The process of registration was sketched by the Act in the briefest of outlines. All the Act required was the booking of the whole writ in the books of the register within 48 hours of its ingiving. If this were done, the deed passed the test of registration. A marking on the writ by the Keeper of the

(1) Observations on Acts of Parliament, p.353.

Register and signed by him of the day, month and year of the registration, with a reference to book and folio of engrossment, furnished prima facie evidence of valid registration. It is important not to lose sight of the fact that the improvements which were made later on were designed to buttress this simple rampart and not to alter the main design.

Where a deed, therefore, was fully and accurately copied into the Record within the time limit fixed by the Act, there was no question for the Court to decide. The disturbing influence of the Minute Book did not make itself felt till much later.

As the work of copying the deed was then, perforce, a work of manual labour, depending entirely on the human element, mistakes in recording, such as an omission of part of the deed or an error in transcription, were liable to occur, raising the question, on discovery, whether the registration in a particular case was inept or otherwise.

On this head, reviewing the decisions of the Court which extend beyond the date of the introduction of the Minute Book, we find that save for a temporary lapse of short duration the Court endeavoured to enforce strict compliance with the letter of the Act, ordering full registration. Moreover, when it was learned that Keepers of the Registers had developed

the habit of omitting to record the notary's docquet at the end of deeds, under the plea of the uniformity of style of the docquet, the Court passed an Act of Sederunt on 17th January, 1756, in order to discountenance this arbitrary procedure.

Any error in essentials in the Record was held by the Court as fatal to the registration. Thus in *Gray v Hope*⁽¹⁾ and *Stewart v Earl of Fife*⁽²⁾, where the Keeper had omitted to engross part of the Sasines, the same were held not to have been recorded. The like result followed errors in the transcription in the Record of the date of an Instrument of Sasine and of the year of the King's reign in Precept of Sasine.⁽³⁾

On the other hand, if the Court, as these cases have shewn, has consistently taken a very strict view of its duty to safeguard the accuracy of the Record, it has been equally consistent in according the benefit of registration to deeds whose transcription had fulfilled the bare requirements of the Act, although the manner of their engrossment may not have fitted in with certain customary rules which prudence has

(1) 23 Feb., 1790, M.8796.

(2) 20 Feb., 1827, 5 S.383.

(3) *McQueen v Nairne*, 23 Jan., 1824, 2 S.537.
Dennistoun v Speirs, 16 Nov., 1824, 3 S.285.

devised for regulating the extension of writings. For example, the Court repelled an objection taken to the recording of a deed on the ground that the day, month and year were written on the Register by a marginal note which was neither subscribed nor authenticated.⁽¹⁾ The reason for this decision was that no instructions for authentication were laid down in the Act. From the remarks which fell from the Bench in the case of Adam v Duthie it was quite clear that our Judges strongly deprecated the addition of any headings or other extraneous matter in the Record because they felt that these self-imposed duties of the Keepers increased the chances of error.

Summed up, therefore, in one sentence, so far as the engrossment of the writ was concerned, the Court on the whole took its stand on literal obedience to the Act. The qualifying words "on the whole" must be used, for there were occasions where the Court ex nobile officio permitted the record to be recorded after the expiry of the sixty days from the date of the Sasine. In lending an ear to appeals to correct the record after the date referred to, the Court seemed to have been torn between two loyalties, one towards the maintenance of the inviolability of the

(1) MacLaine v MacLaine, 16 June, 1852, 14 D.870.

record and the other towards innocent third parties who might have been injured by the consequences of an obvious clerical error. In circumstances of this kind the Court could not and did not act upon any fixed rule. They were guided by the consideration that permission to rectify the register should not be readily granted, but if granted, the correction should be allowed only under such conditions as would not prejudice the rights of the public for whose benefit the registers were introduced.

The decisions given by the Court, noted below, typify their frame of mind on this matter.

In the case of Innes,⁽¹⁾ the Court allowed the correction of an error in transcribing a name in the record on the condition that the correction should be available only from the date when made. Similarly, in Tait's⁽²⁾ case the petition to correct the mistake in the bond in the sum repayable to redeem the lands was granted under reservation of the rights of third parties. In another case where a petitioner appealed to the Court that an omission to engross the subscription of the notary and witnesses at the end of a Sasine should be rectified by a marking on the

(1) F.C. 20 Dec., 1816.

(2) 17 Jan., 1822, 1 S.241.

margin of the record, warrant in terms of the prayer was granted, but only after the Petition was served on the Lord Clerk Register and the Keeper of the Register and intimated on the Walls and in the Minute Book.⁽¹⁾

In contrast to these rather exceptional cases, in *McQueen v Nairne*⁽²⁾ where the omission of the word "primo" in the Record bore an infertment to have been taken on 10th April, 1820, instead of 10th April, 1821, the Lords held the registration to be invalid. The reason given by the Court for their decision was that it was their duty to maintain the purity of the Record, especially so, since an extract was by the Act equally as probative as the original. In harmony with this decision the Court refused permission to correct the booking of a Sasine in *Dennistoun v Speirs*⁽³⁾ where a similar mistake occurred. In delivering judgment in *Dennistoun v Speirs* their Lordships stated that the permission given by the Court to rectify the Register in Tait's case was given per incuriam and ought not to be followed.

No provision was made in the Act with regard to erasures in the Record, so they came under the law as applicable to erasures in Instruments of Sasines.

(1) *Duke of Montrose*, 17 June, 1846, 8 D.822.

(2) *Supra*.

(3) *Supra*.

At that time Sasines containing erasures in essential parts and not authenticated were null.⁽¹⁾ So far as erasures in Instruments were concerned, a change in the law, for which we have to thank the experience derived through the system of registration, was made by the Act 6 & 7 Will. IV., c.33, which was amended by Consol. Act of 1868, s.44. The Act of William, proceeding on the narrative of the Registration Act of 1617 and subsequent relative Statutes and the repetition of questions as to the validity of Instruments founded upon erasures not appearing on record, enacted that no challenge of any Sasine should thereafter receive effect on the ground of erasure, without proof of fraud, or that the Record was not conformable to the writ as presented for registration. The counterpart of this for the Record was provided by the Conveyancing Act of 1874 (s.54).

When the Act was introduced, deeds were written on skins of parchment; but in the process of time the tendency was for titles to land to become longer, as more elaborate provisions were invented and descriptions of lands became more particularised, so much so that it became impossible to engross the full contents of deeds on a single skin of parchment.

(1) See Anderson, 1828, 6 S.463. Hoggan & Smith v Ranken, 1835, 13 S.461.

Accordingly a practice had grown up of writing deeds book-wise. The new practice was first sanctioned for deeds passing the Seals by the Act of 1672, c.16 (viii, 69). Sasines, however, were excluded from this Act, and proprietors of land who adopted the new method made the vexatious discovery that Keepers of the Registers felt themselves obliged to refuse registration to such deeds. Naturally titled people in particular, whose titles to land were, on account of their extensive possessions, invariably lengthy, were the first to be baulked by an obstacle to registration which the framers of the Act could not have foreseen.

The proprietors who were thus hampered sought a way out of their difficulty by petitioning the Privy Council for a warrant on Keepers of the Registers to record their deeds. The Privy Council invariably granted these requests, but as they issued no general warrant to the Keepers which would cover all future contingencies, the same procedure was carried out by separate application and petition as each particular occasion for it arose. The Books of the Privy Council record 10 such applications between the years 1666 and 1686. The applicants were, with only two exceptions, one of whom was the famous Mackenzie of Rosehaugh, titled people of very high rank. This

monotonous procedure was finally rendered unnecessary by the Act of 1686, c.29, which legalised Sasines written in book-wise form.

It is worth recalling that the last applicant before the Privy Council was no less a person than the Earl of Panmure, who was present as a member of the Council at the Sederunt which granted his petition.⁽¹⁾ This lucky circumstance must have helped to hasten the inbringing of the last mentioned Act.

Section V. CERTIFICATE OF REGISTRATION.

The history of litigation on registration has demonstrated that as much trouble was caused to the lieges through carelessness on the part of those who were entrusted with the working of the registers as might have been legitimately written down to defects in this, our primary Act on registration.

As we shall see later on when dealing with the subject of the Minute Book, slovenliness in the execution of their duties by officials of the registers was at one time so widespread that it caused national concern. But the most glaring examples of carelessness have to be sought for much earlier. In the

(1) R.P.C., 3rd series, xii. 237.

latter half of the 17th century it transpired that gross deception had been practised by officials who returned writs with a marking bearing that they had been duly recorded, though in fact they had never been engrossed in the record.⁽¹⁾ It is possible that some of these officials were ignorant of the nature and function of registration. Even some of our Judges at one time shewed a lack of comprehension of the true object of land registration and they attached undue importance to the certificate of registration. The terms of the Act relating to the certificate of registration should certainly not have misled anyone on this point.

When these instances of dereliction from duty were discovered, instead of applying the penalty of the Act to deeds which were not booked, our legislators hastened to pass an Act, the effect of which was to make the certificate of registration a statutory equivalent for registration (1686, c.19).

This Act was obviously a serious blunder. It suggested that the indemnification of individuals was the primary consideration, whereas the security of the public ought to have come first in the minds of our legislators. "If the instrument was not recorded in the Books, what could the public learn from

(1) Vide Carmichael & Whytfoord, Dec. 1685, M.13558.

"the Record? and on the other hand, if the writ
"happened to be lost, where was the party to get an
"extract?"

Fortunately good sense was not long in being restored and this mistaken Act was repealed by the Act of 1696, c.18. Yet with the passing of the latter Act a certain amount of doubt on the value of the Certificate of Registration still lingered on. In two famous cases, those of Adam v Duthie⁽¹⁾ and Drummond v Ramsay⁽²⁾, where similar irregularities had been perpetrated in the process of registering Sasines, the fact that in the former case, as distinct from the latter, the Certificate of Registration was not vitiated influenced the Bench in bringing a verdict in favour of the validity of the registration in the one case but not in the other. These decisions instigated the plea of the Pursuer in the case of Gibson v Cochran⁽³⁾ that a Sasine was invalidated by an error and erasure in the Certificate of Registration. The Court, however, rejected this plea and upheld the registration of the deed in respect of its having been duly completed by being engrossed in the Record in regular order of the Minute Book. The wisdom of this decision has never since been questioned.

(1) 19 June, 1810, F.C.

(2) 24 June, 1809, F.C.

(3) 10 July, 1838, 16 S.332.

Section VI. EFFECTS OF REGISTRATION.

One may postulate that a register of deeds, as a general rule, makes its influence felt in two directions. First of all, it marks a break with older methods of completing title, generally curtailing or simplifying a more cumbersome procedure, and, secondly, it either introduces a new law or profoundly modifies the existing law for regulating preferences among titles to land. In Scotland, however, these looked for changes did not materialise to any appreciable extent with the introduction of the Register. Why this was so becomes apparent when we consider the state of the law of preferences among titles to land as it stood at the commencement of the 17th century.

As already stated, entry with the superior constituted an indispensable link in the chain of infeftment. At the time in question entry with a superior was effected either by resignation in favorem with the superior's consent or by infeftment on a charter a me subsequently confirmed by him. There was still another method of obtaining entry. Operating on the provisions of the Act of 1469, c.12 (ii, 96), a purchaser might comprise the lands for a fictitious debt and charge the superior to receive him as vassal. All of these methods had one advantage in common -

they gave the vassal what was then known as a public right. Where the superior either refused or was unwilling to give his consent, a purchaser sought safety by accepting a charter de me from the seller, which was then termed a base right.

The difference between public right and base right was more than a matter of form. Not only was it not confined to problems of linking of title and the text of writs of progress, but it was also of vital importance in determining preferences.

Prior to the inauguration of the Registers, preferences among land rights were governed by the maxim prior in tempore, potior in jure. This was understood to mean that among sasines given out at different times the first in date was preferred to others later in date, providing "it proceeded upon a right "complete in itself" - in the case of a public right on a Charter of Resignation, or upon a precept a me confirmed by the superior. Base rights were complete by themselves. Sasine on a precept de me created a mid-superiority in the granter's favour, but it gave a complete title to the dominium utile, even to the extent of prevailing over a sasine of earlier date proceeding on a Charter a me but not confirmed.

As infestment in a public right was bound up

with delay, unscrupulous people often took advantage of the opportunity given to them by the law of expediting fraudulent subaltern rights in privacy on which no possession followed, before confirmation could be obtained by bona fide purchasers who had taken charters with a me holdings. This type of fraud was evidently rife until the Act of 1540, c.23 (ii, 375) was passed.

By the last mentioned Act a new feature was tacked on to base holdings. The test of possession was made to apply to them. The effect of this Act was to declare that thenceforth purchasers for onerous consideration retaining peaceable possession for a year and a day would have priority over those who were infect in privacy, although the rights of the former might be posterior in date to those of the latter.

Consequent on the Act of 1540 and the interpretation put on it by the Court, the law regarding preferences underwent a considerable modification. Public rights were now preferred to base ones without possession. Base holdings with possession gained priority over similar holdings without possession, agreeably to the maxim "*Prior possessio cum titulo posteriore melior est priore titulo sine possessione*". Where the Act did not apply, the common law still held

good; therefore in a competition between two base holdings neither of which was clothed with possession one reverted to the rule potior in tempore, prior in jure. In the same way preferences in public rights by the general rule of law were determined not by the dates of the sasines but by the dates of the confirmations.

The fact that the Act of 1617 made reference to the frauds caused by alienations done in privacy is clear proof that the Act of 1540 did not entirely do away with the evil it sought to prevent. The most that could have been said in its favour was that it narrowed the gap through which frauds might penetrate.

The Act of 1617 made no radical change in the law governing preferences. Judging from the tenor of the Act, our legislators had no other intention when setting up the Registers than to secure publicity for land transactions, so that innocent people might no longer be defrauded through transactions hidden from everyone's gaze. In view of the circumstances prevailing at the time of the Act, this aim alone was well worth realising. The benefit which accrued to the individual proprietor was indirect, inasmuch as the reward he gained for co-operating in a measure devised for benefit of the public was that his transaction was rescued from the taint of simulation.

The measure of compulsion brought to bear on him to enforce his compliance was the annulment of his deed if it were not registered. He did not gain, and it seems he was not intended to gain any advantage by the registration of his deed in a competition beyond that which his title derived from the law as it existed at the introduction of the Registers.

Plainly, however, the effect of the Act was to put all deeds registered under it on the same plane, i.e., they were all made public and the charge of simulation could therefore not have been levelled against any one of them. Had this situation been fully realised at the time, a much greater alteration would have been made in the law regulating preferences than was actually the case, and the Act of 1693, c.22, would have been anticipated by 76 years.

It will be recalled that the Act of 1540 demanded possession to a base holding as a condition of its competing with a public holding. The kind of possession required by that Act was the actual labouring of the ground and receiving the rents for a whole year, or what was known as natural possession. As may be readily granted, natural possession is of prime importance where registration is non-existent. On the other hand it is essential to a standard system of land registration that civil possession be regarded

as having automatically followed an entry in the register. That this consideration was not lost sight of by legal minds in the 17th century is made abundantly clear by the attitude of the Scottish Bench contemporaneously with the introduction of the Registers, because the slenderest acts of possession or of civil possession by drawing the rents or diligence to obtain it were sanctioned by the Court in lieu of the natural possession of the lands.⁽¹⁾ The good intentions of the Bench, however, were productive of as much evil as good. A flood of litigation was let loose, and rights to land became very precarious and liable to the uncertain proof of witnesses of a disponent's possession. This state of affairs led to a crisis in our system of registration.

There was only one way out of the impasse, caused in part by the good intentions of the Bench, and that was to dispense altogether with the test of possession and determine preferences among land rights by the criterion of priority of registration, without regard to the distinction of public or base infeftment. The necessary change was carried out by the Act of 1693, c.22 (xi, 271) which enacted that all infeftments, whether of property or annual rent or

(1) Ersk. 2. 7. 12.

other real right, whereupon sasines should be taken, should be preferred according to the date and priority of the registration of the sasines.

It will be observed that the operative words of the Act of 1693 referred to sasines only. These raised doubt whether Resignations ad remanentiam and Reversions fell within the Statute, but, as the rubric of the Act referred to the determination of competitions and preferences of all real rights, it was thought they were included by implication. There never was any judicial decision on this point.⁽¹⁾

Section VII. EFFECT OF NON-REGISTRATION.

We are in the happy position to-day of being able to say without any hesitation that a disposition of land confers no real right until recorded. We can also tell who will be the gainer and who will be the loser by failure to register. This positive knowledge was not acquired until more than two centuries had elapsed since the introduction of the Act.

In the intervening period two sets of views had been maintained on the effect of non-registration under the Act. The one view ran that a sasine

(1) Ross's Lectures, II., 228. Ersk. 2. 8. 12.

unrecorded was not void for all purposes, while the other rejected an unrecorded sasine as absolutely null. Both were argued with considerable force and logic by their protagonists. The outcome of the legal battle which was waged between these two schools of legal thought was of cardinal importance to conveyancers as well as to the Registers.

So long as this issue was not settled the practitioner was frequently in a dilemma. As the recorded cases have shown, there were occasions on which he had to make up his mind, but without any confidence in his ultimate choice, whether he could accept as part of a progress of title a deed on which infeftment had been completed but on which no registration had followed. His perplexity was not diminished when he had to tackle the question of making up a title to a party who was the heir of a person who had held under an unregistered infeftment.

Mingled views on the effect of non-registration under the Act lingered on until the year 1847, when the decision in the case of *Young v Leith*⁽¹⁾ was given. Lord Fullerton was the leading spokesman for the Bench in delivering judgment. Fortunately he neglected no aspect of this question, besides which

(1) 11th Mar. 1847, 9 D. 932.

he chose just the right phrases to erase all future doubts from the minds of conveyancers.

The controversy might never have arisen had the nullity clause of the Act been drafted with the same precision as the Act of 1599 (iv, 184) and the later Acts of 1669, c.4 (vii, 556), and 1696, c.18 (x, 60). It will be remembered that under the Act of 1599 deeds not registered were declared absolutely null. This enactment was repeated in the Acts of 1669 and 1693. The precise statement of the Act of 1599 on the effect of non-registration was not repeated in the Act of 1617. Instead, we find a rather involved clause, in the following terms: "the same (if not "registered) to mak no faith in judgment by way of "action or exception in prejudice of a third party "who hath acquired ane perfect and lauchful right to "the saidis landis and heritages but prejudice alwayes "to thaim to use the saidis writtis aganis the pairtye "makker thereof, his heirs and successors". As thus worded this clause did not in specific terms declare an unrecorded deed null. It lacked precision, a failing which was common to many other Acts passed about this period. Moreover other faults, although of a less disturbing character, appeared in it. For example, through a misuse of the words "said lands and heritages" the enactment might seem to have had

the effect of confining the nullity to the lands of which the preamble contemplates their alienation by a proprietor for "gryit soumes of money" after he had granted a private right. If this construction of the Act had been followed, the other class of writs mentioned in the Act which did not admit of infeftment would have been freed from the penal consequences of the Act. However, at no time had there been any serious attempt to argue such a reading of the clause.

Leaving aside minor defects in the clause, an answer had still to be given on the main question, namely, whether a writ which had not been effectually recorded, was to all intents and purposes absolutely null, or whether it remained, under certain qualifications, a good enough title to convey a right and act as a barrier to the execution of a second sasine.

As already stated, this question was not finally answered until the case of Young v Leith. During the long period of 230 years which had intervened between the introduction of the registers and the case of Young, through lack of unanimity and uniformity in the decisions of the Court, a state of great uncertainty prevailed in the legal world on a subject which was of considerable importance to every section of the community.

Reflecting, however, on the history of this

controversy we may find many causes which help to explain why the ruling that a sasine not recorded was absolutely null, took so long in being definitely established. To begin with, it was most unfortunate that the penalty clause of the Act was so loosely worded and that fault could be found with the positioning of other clauses of the Act. All this, of course, tended to obscure the real meaning of the clause. But a much greater stumbling block to the general acceptance of the ruling which was ultimately adopted was the awkward fact of the addition of a reservation to the nullity clause, in an Act passed within the short period of 18 years of the passing of the Act of 1599 which did give a categorical reply to a straight question instead of a qualified nay. This fact alone, without any other accompanying circumstances, was bound to have led to the voicing of an opinion that the penalising clause of the Act of 1617 constituted an intentional departure from the Act of 1599 and, therefore, behoved to be interpreted differently. On one point, namely that the granter and his heirs could not oppose the plea of nullity to the unregistered deed of their grantee, there had always been general agreement even among those who held conflicting opinions on the major issues. This was quite understandable on any ground. If the equitable

view were to be regarded, no other course was possible. Moreover, a granter was liable in the warrandice of his conveyance.

Returning to the main path of the discussion, there was the one school of legal thought which would not concede the proposition that an unregistered sasine was absolutely null, and that, to quote Lord Medwyn⁽¹⁾ "a proprietor in that situation has nothing "more than a mere personal right like a disponee un-"infest". This same judge also made capital of the fact that Lord Haddington, who was President of the Court of Session from 1616 to 1626, as well as being the first Keeper of the Register, presided over the Court when several decisions were given, supporting the view of the limited application of the nullity clause to a third party who had acquired a perfect right to lands in dispute. Among the older cases relied on for support of the view that an unregistered sasine was not absolutely null were those of Laird of Dunipace⁽²⁾ and Gray v Tenants⁽³⁾, which were cases between landlord and tenant, and Rowan v Colville⁽⁴⁾ where an unregistered sasine of a mill was held a

(1) Young v Leith, supra.

(2) 25 Mar., 1623, M.13538.

(3) 24 Mar., 1626, M.13540.

(4) 21 July, 1638, M.13546.

good title to multures. Two later cases, namely, Faa v Lord Powrie,⁽¹⁾ where an unregistered sasine was found a good title to pursue a declarator of non-entry, and Dalmahoy v Ainslie⁽²⁾ where it was found that an unregistered title may be an active title in improbation of other rights on land, were also adduced in support. These cases appeared to support the view that the clause was limited in its scope; nevertheless one cannot be sure that those judges who were contemporaries of the framers of the Act, or more nearly so, had any decided bias one way or another in this matter. Clear thinking on the function of the Act was not a marked feature of the period denoted, and, in any event, the cases narrated above seemed to have gone on specialities. For instance, in questions between landlord and tenant or superior and vassal, the tenant or vassal may be barred personali exceptione from objecting to the apparent title of the landlord or superior, as it is the foundation of his own right. So far as the tenant and vassal were concerned, they were in the same position as the heir of a granter of an unregistered sasine.

In sharp contrast to those lawyers who took a

(1) 12 June, 1673, M.13551.

(2) 14 Nov., 1678, M.5170.

less drastic view of the penalising clause, among whom were enrolled such authorities as Erskine⁽¹⁾ and Walter Ross⁽²⁾, were those who maintained that on a fair construction the clause amounted to a declaration of nullity. Stair⁽³⁾ and Kaimes⁽⁴⁾ were numbered among the latter. This conclusion was founded on the following arguments. In the first place, the exception in the clause as to the "maker and his heirs and successors" was mere surplusage and that it was probably inserted ob majorem cautelam, lest by its omission a granter might be tempted to deny his own grant.⁽⁵⁾ In the second place, the Act of 1669 was really a boomerang which could be used to help their own point of view. Resignations ad remanentiam and Sasines were identical in purpose; therefore they ought not to be separated. Both were alike in respect that by each of them one party was divested of a real right which was re-invested in another. Hence there was no logical reason for applying a less severe penalty in the case of the latter than in the case of the former. Did not the Act of 1669 state

(1) 2. 3. 40.

(2) Lectures, II., 210.

(3) 2. 11. 11.

(4) Elucidations, 293-5.

(5) See Kibbles & Stevenson, 18 Dec., 1830, 9. 3.233.

that Resignations ad remanentiam were to be registered "in the same manner and way and at the same rates "as Renunciations, Sasines, or Reversions"? Finally, there was the Act of 1696, c.18 (x, 60) which enacted that thenceforth no writ "was to be of any force or "effect against any but the granter and his heirs unless it was duly registered".

Regarding the last mentioned Act, Lord Fullerton said: "The first remark suggested by this Statute is "that it removes the ambiguity or obscurity of the "Act of 1617 in one most important particular, namely "the supposed limitation of the nullifying clause to "the case in which the other parties had acquired a "perfect right to the lands".

With the passing of the Act of 1696 the controversy ought really to have come to an end. Unfortunately, certain factors helped to keep it alive. On the first occasion (Keith v Sinclair⁽¹⁾) after 1696 on which the question under review came before the Court, to all appearances an unregistered sasine was sustained against a third party linking his title with a last recorded sasine. There was some ground for doubting whether this case had ever been regarded as an authority, but it left an impression nevertheless.⁽²⁾

(1) 17 Dec., 1703, M.13562-4.

(2) See Notes on Crawford v McMichen, II. Ross L.C. 119-20.

Two years later, when the important case of Earneslaw⁽¹⁾ came up for judgment, the Bench overturned the decision given in Keith v Sinclair, and preferred an adjudger who had acquired right from the nearest heiress served to her father, to an adjudger of the haereditas jacens of the son who predeceased his father without registering the disposition from his parent. The pursuer's argument in this case, and one which was successful, was, that as no disposition in favour of the son was to be found in the Record, his sister had no legal certioration of her brother's infetment. In effect this decision established the principle that a granter is not divested of his right until registration takes place.

Apart from those two cases, we have no record of any further litigation on this subject during the 18th century, but during the first half of the 19th century the clause again became a subject for judicial discussion whence old doubts were once more revived, though in every one of the cases which were brought before the Court the decision in Earneslaw was consistently upheld. The cases referred to are Kibble v Stewart (16 June, 1814, F.C.), Baxter v Watson (2 Dec. 1818, not reported), Kibble v Stevenson (supra, affd. in House of Lords), Magistrates of

(1) 29 Nov., 1705, M.13564.

Brechin v Arbuthnott (11 Dec. 1840, 3 D.216) and Young v Leith. With the last of these cases it became settled law that an unregistered sasine was absolutely null.

Thanks also to these cases and the very learned discussions which they occasioned, the effect on the state of title of an unregistered sasine was lucidly explained. Thus it was made clear that an unrecorded sasine left the precept of sasine unexhausted, and that there was therefore nothing to prevent a holder of an unregistered sasine from expeding a second sasine on it, although this article was not conceded without further controversy. Arguing from the terms of the clause and the rule of law that once a precept of sasine was duly executed the fee was full, some people maintained that a sasine unrecorded was a real right and that the precept of sasine could not authorise the taking of a second sasine, although they admitted that from an omission to conform to the statutory requirement of recording, the real right thereby constituted was liable to be cut down in a competition with a third party whose infestment had been properly recorded. Common sense was, however, with the other side. If the fee were full, no creditor of the granter of an unrecorded sasine could adjudge the estate and the granter himself would have no

power to carry away the estate by the granting of a second precept of sasine; but as the reverse was admittedly the case, it necessarily followed that the granter of an unrecorded sasine was not divested of his estate, that his mandate was not exhausted and that the precept of sasine which he had already granted was "still a good warrant to the effect of carrying into complete execution the will of the granter".⁽¹⁾ This point came fairly to the test in Kibble & Stevenson. This case, coming close on the heels of Kibble & Stewart where it was held that a grantee was not barred from taking infeftment on his procuratory of resignation, although he had already completed his title by a sasine recorded and confirmed, re-assured conveyancers who had made up titles agreeable to the principles laid down in these cases, and for all future time members of the profession were to be spared the anxieties which for a long time must have sorely tried their predecessors. Another result of these cases, and one which was welcomed by conveyancers, was that all disputes inter haeredes bearing on the effect of an unregistered sasine were also governed by the simple proposition that an unregistered sasine was absolutely null. It swept away all doubts

(1) Bell's Commentaries, 7th ed., I., 735-6.

as to the value of an unregistered sasine expedite on a special service before the passing of the Consolidation Act of 1868. The plea put forward in *Young v Leith* that a sasine unrecorded was good inter haeredes was negatived, and the ruling was given that "the next heir is in the situation of a third party" and can only be excluded by the deed of a party "validly infeft".

With the formulation of these principles an unbreachable rampart has been built round the Register.

Very wisely too, the Bench had kept an open eye for any other threats to the usefulness of the Registers, from whatever quarter these may have issued. Under circumstances which must have evoked the sympathy of the Court for the defenders, the Bench nevertheless was impelled to reject the plea put forward in *Crawford v McMichen*⁽¹⁾ that an unregistered sasine was a good title on which to found prescription. It also resisted the suggestion that a holder of recorded title was deprived of the benefit of the clause because of his private knowledge of an omission to record on the part of his competitor.⁽²⁾ An even more serious threat to the security of the Registers was removed by the wisdom of the Bench in 1737. The

(1) *Supra*.

(2) *Leslie v McIndoe*, 1824, 3, S.48.

decision of the Court in the case of Bell v Gartshore⁽¹⁾ had put an end to a series of ill-considered judgments, and had the effect of making the preference in a competition between holders of assignations of personal rights subsist upon the acquirement of a real right by infeftment.

Since the clearing up of all those ambiguities and difficulties which we have just discussed, the Court has never again been confronted with any vital issue, bearing on the reasons for which the Register was established. But, as we shall soon learn, there were many other occasions on which the Court were troubled with disputes owing their origin to some technical flaw in the process of registration, quite apart from those already mentioned which arose through mistakes in the booking of writs.

Section VIII. MINUTE BOOK.

It was a good augury for the success of our system of registration that a man of the calibre of Lord Haddington presided at its birth. He was the

(1) Bell v Gartshore, 1737, 2, Ross, L.C. 410, ratifying Brown v Smith, 1676, M.2844, and over-ruling Erskine v Hamilton, 1710, M.2846, Rule v Purdie, 1710, M.2844, and Sinclair v Sinclair, 1733, M.2848.

first Keeper of the Register. Besides being a man of very wide experience and a talented administrator, he was also President of the Court of Session during the years 1616 to 1626. He was the author of the Acts which were passed through Parliament in 1621, and he probably took a prominent, if not the leading part in shaping the proposals of the Act of 1617. Therefore the watchful eye of one who was deeply interested in the success of the Act probably supervised its early workings. We have evidence of Acts of Parliament to show that succeeding generations maintained the same vigilance.⁽¹⁾ When it came to the knowledge of Charles I. that some of the Keepers of the Registers omitted to have their Books marked by the Clerk of the Register or his Deputies, he commanded the Lord Clerk Register to call all the Keepers before him in order that he, the Lord Clerk Register, might learn whether they performed their duties, and also to take steps to rectify the abuse of which the King specially complained.⁽²⁾

There were a few incidents connected with claims to retain the office of Keeper, some of which had an amusing side to them, but these hardly affected the

(1) See Parliamentary Proceedings, 1641, A.P. V.623(b).
Ibid., 681 (a), 1649, c.160; VI. pt.II., 449.

(2) R.P.C. 17 June, 1634, 2nd series; V. 273.

welfare of the public. They were of an internal character and were really disputes between the Lord Clerk Register and persons alleged by him to have usurped the post of Keepers of the Registers. Evidently widows cherished very strong notions about their right to take up the duties relinquished by their late husbands - a relic of the days when the office of Keeper was a proprietary interest - and the Lord Clerk Register was occasionally obliged to apply to the Privy Council for a charge upon them to deliver up the Registers.⁽¹⁾ The extraordinary behaviour of a former Keeper of the Register at Ayr deserves to be specially noticed. This gentleman signalised his change of calling to a Minister of the Gospel in Ireland by taking the Register away with him to that country. In his case an appeal to the Privy Council was also necessary for its recovery.⁽²⁾

In spite, however, of the more or less careful supervision which was exercised over the administration of the Registers, Clerks of the Registers failed to fulfil the letter of the Act of 1617 in one important particular. But the fault, if it were a fault, could not be imputed to them. In this case they were more

(1) Ibid., 24 July, 1628, ii. 398; 22 Dec., 1631, iv. 400.

(2) Ibid., 1673, 3rd series, iv., 13 and 59.

sinned against than sinning. They were asked to perform the impossible. It will be remembered that one of the clauses of the 1617 Act required the Keepers to transcribe the whole body of the writ within 48 hours of its receipt. No regulation was laid down for the booking of deeds in the order of their presentment.

On account of the number of writs presented for registration, which tended to increase with the passing of half a century or more from the date of the Act, Keepers often found it was beyond their power to meet with the above requirement. Officials were impaled on the horns of a dilemma. One requirement or other had to go by the board. Less scrupulous Keepers returned the deeds unbooked; others retained the writs in their hands beyond the allotted period until they could overtake the work. Where a Keeper adopted the latter course he ran the risk of being suspected of furthering the interests of one party as against another, although he may have been entirely innocent of harbouring any such design.

One course which suggested itself as a valuable check on officials was the addition of a Minute Book in which they would be obliged to make a note of all deeds presented to them immediately on receipt. Then all that would be required after that to frighten

officials into registering deeds in their order of presentation would be to throw this Book open to the public for inspection.

The Court took an active interest in this proposal, if it was not actually the instigator of it, because we find it was first embodied in the Act of Sederunt of 6 June, 1663. This Act, however, was not much attended to, but those who took the matter to heart were not long in making another effort, and they succeeded in getting the Minute Book established by an Act of Parliament in 1672.⁽¹⁾ Under this Act Keepers were instructed to keep Minute Books containing the names, surnames and designations of the parties and common designation of the Lordship, Barony or Tenendry of the several lands mentioned in writs presented for registration which should be patent to the lieges on payment of certain fees. The onus was laid on Sheriffs and other public officials of making arrangements for a quarterly comparison of the Register Books with the Minute Books, under penalty of £100 Scots for each failure to do so. The Clerks of the Register were also warned that they would be deprived of their office if they neglected the provisions of the Act, as well as being liable in damages

(1) c.40, Art. 32; viii, 86.

to any party injured through their neglect.

In spite of these careful regulations, the Act was not a success. Many Sheriffs paid not the slightest attention to it and letters of horning were directed against them to meet and collate the Books of the Register (Act of Sederunt, 4 Jan. 1677). But the need of the Minute was not to be denied.

Under the wise presidency of Lord Stair the Court came to the rescue and another Act of Sederunt was passed on 15th July, 1692, which subsequently became the Act of 1693, c.23 (ix, 271). This Act of Parliament ordained all Keepers to keep Minute Books which should be patent to all the lieges without any charge and in which, immediately on the presentment of writs, they should insert the name and designation of the presenters and the day and hour when presented.. Each minute was also to be signed by the presenter and Keeper simultaneously, and the Keeper was to engross the writs in the Record Book in the same order as they appeared in the Minute Book, under certification of damages.

We learn, through Fountainhall, that an overture was made to Parliament in the year 1681 that the Minute Books should be printed yearly and distributed to the public at the price of 12d per copy, so that any person might know what incumbrances affected any

land in Scotland. According to the same writer, owing to the opposition of the gentry,⁽¹⁾ the proposal came to naught. The Act of 1693 was certainly a better remedy and gave as much information as was necessary to interested parties but no more.

With the passing of the three Acts, namely the Act of 1693⁽²⁾ c.22, which declared that Sasines were to be preferred according to the date of their registration, the Act of 1693, c.23, and the Act of 1696, c.18, which ordained that save against the granter and his heirs, a deed not booked and inserted in the Register was null, the principal objectives of our system of registration were attained. The changes in the law of registration which were made in the 19th century were inevitably bound up with the great Conveyancing reforms of that period and they made no substantial modifications on the design of the Registers worked out by the end of the 17th century.

From these observations it will be gathered that, so far as it depended on statutory law, after the year 1696, for the effectual registration of a writ two acts had to be consummated by the Registrar, first, a booking of the writ in the Minute Book, which fixed the date of registration and regulated

(1) Fountainhall, I., 156.

(2) ix. 271.

its preference in a competition, and, second, its engrossment in full in the Record Volume; whereas formerly the res gesta of registration referred to its engrossment in the Record Volume alone. Prior, therefore, to the Act of 1696, c.18, all attempts which were made to upset deeds on the ground of irregularity of registration were focussed on the regularity and sufficiency of the engrossment in the Record Volume; but after 1696 they were directed to the regularity and sufficiency of the entry in the Minute Book as well as to its engrossment in the Record.

The directions regarding the registration of deeds in the Acts of 1693, c.23, and 1696, c.18, were very precise, and no one ought to have mistaken their import. If one were inclined to find any fault with them, then criticism might have been levelled at the retention of that part of the Act of 1617 which required the Keeper of the Register to engross a deed within 48 hours.

The phrase "to be engrossed with all due despatch" which was a later invention of the Registration Acts of the 19th century, was one which might then have been adopted with advantage. Because this was not done at the appropriate time some people thought that the Record Volume, so far as fixing the

date of registration was concerned, was not yet a spent force and they challenged the validity of the registration of certain deeds on the ground that they were not actually engrossed on the date of the attestation appearing on the back of these deeds. These objections, however, were overruled by the Bench, for the very simple reason that in the generality of cases it was impossible for the Clerk to effect an entry in the Minute Book and an engrossment in the Record at one and the same time. Had the opposite view been taken, any copying clerk would have had it within his power to bring the Records into confusion, and precision in fixing the date of registration, which could only be obtained from the Minute Book, would have been impossible.

The plain reading of the Statute of 1693, c.23, gave very little scope for doubting the claim of the Minute Book in this respect, and probably no question on this score would ever have arisen had it not been brought to the forefront by those freeholders who formerly had a monopoly of the franchise. Before the Reform Act of 1832, when the vote rested on a property qualification, it was essential for a claimant applying to be enrolled on the list of freeholders to prove not only that he possessed the necessary property qualification but also that he was publicly

infert in the lands, in respect of which he based his claim, and his sasine registered for a year and a day prior to the statutory meeting of freeholders.⁽¹⁾

As the privilege of the franchise was then a very valuable perquisite which they did not wish to share with others, freeholders sought every opportunity to keep down their own numbers. The possibility of rejecting an applicant for the vote on the ground that he was not validly infert for the period stated above was therefore never lost sight of. Accordingly, until the democratic extension of the franchise the title deeds of every aspirant for the vote were examined with the most meticulous care, and, naturally, the Register was also minutely scrutinised in the hope that some error in registration might come to light which would assist the freeholders in defeating a claim. "It's an ill wind that blows nobody any good", and it may be said that out of these inquisitorial proceedings much good resulted.

In the course of their examination of the Minute Books and the Record Volumes the freeholders made some astounding discoveries, which showed up many of the clerks of the Registers in a very bad light. One consequence, however, of these revelations was that

(1) 9 Anne, c.6, 16 Geo. II. c.xi, sec.10.

in the future statutory routine was strictly attended to, and to-day we can happily affirm that intentional departures from statutory rules have never since recurred to disquiet the mind of the public.

Adverting to these particular irregularities, the first result of this activity of the freeholders can be seen in the case of Gray v Hope (*supra*). This case really dealt with an omission from the Record of the names of certain lands in the clause of delivery of an Instrument of Sasine; but we are indebted to it for the opinion that when it appears from the Record that a Sasine has been engrossed of the same date with the attestation on the back and the marking of the Minute Book, this cannot be re-dargued by parole testimony without giving more credit to the Keepers of the Register than to the Register itself. In effect this could only mean that the Minute Book and the Record Volume together form a combination and the actual entry in the Record Volume is held to be of the date shown in the Minute Book, whose evidence cannot be controverted by parole proof or any other inferior species of evidence.⁽¹⁾

This article of registration law came fairly to trial in case Mackenzie v McLeod.⁽²⁾ Here, although

(1) Bell's Election Laws, 263.

(2) 9 Feb. 1768; M 8800.

the entry in the Minute Book was perfectly in order and the entry in the Record Volume entirely corresponding with it, the freeholders nevertheless averred that the Sasine was not recorded in the order of the Minute Book. If their plea had been entertained the year and a day prescribed by the Act 16 Geo. II. c. XI. would not have been completed since the actual time of the physical act of engrossment; but the Court without listening to any argument on the averment looked to the date of the Minute Book and repelled the objection.

Owing to the negligence on the part of clerks of the Registers to which we have referred, the question of the Minute Book cropped up again and under circumstances which compelled the Court to sanction infringements of the statutory rules. Very frank admissions on this subject were made by various Keepers of the Registers during the hearing of the case Earl of Fife v Gordon and others.⁽¹⁾ The case was brought before the Court on the following facts. Gordon and others were infeft in subjects in the County of Elgin on 29th and 30th September, 1772, and their Instruments of Sasine were entered in the Minute Book on 30th September, but the Minutes were

(1) M.8850.

not signed by the Keeper and the presenters. This omission was discovered by opposing freeholders, who therefore sought to prevent the Keeper from making an entry of the Sasines either in the Minute Book or in the Record Volume of any other date than the one when the Sasines should be properly minuted and signed. The Keeper at the same time, however, had made an entry in the Minute Book stating the fact that the Minutes of the entry of the Sasines were signed of date 3rd October, whilst he gave a Certificate of Registration of date 30th September, 1772. On these facts the freeholders brought their action to have it declared that the Sasines were not registered of the date of attestation. The crucial date in terms of the last mentioned Act was the 1st of October. The freeholders pleaded that it was upon compliance with the whole requisites of the Statutes that the preference of a writ depended, and that signing the Minute Book was a most material requisite, because without it a Keeper might regulate the priority of Sasines at his will. To this the claimants made answer that it was the practice all over Scotland for the Certificate to bear the date of registration, though the Minute was not signed at the date of ingiving. When the accuracy of the claimants' averment was tested by the Court it was found not only

to be correct, but that it actually under-estimated the extent of the deviation from statutory rule which had crept into practice. From the evidence on this matter which was led before the Court and which consisted of depositions from 10 Registration Districts and the Keeper of the General Register of Sasines, it transpired that the General Register at Edinburgh alone passed muster. In the provinces chaos reigned supreme. The Keepers of the Provincial Registers evidently made their own interpretation of the value of the Minute Book and the provisions of the Act of 1693, c.23 - a very low one indeed. From a summary of the practice adopted by Provincial Keepers, which we give below, it will be seen that every possible variety of error received its patronage from their hands. The Minute Book is filled up immediately, if there were time, otherwise it is filled up a day or two thereafter (Orkney); or at leisure (Berwick). The Minute Book is filled up after engrossment (Roxburgh). An account only of the entries for the Minute Book is kept, the deeds are first engrossed and the Minute Book is filled up 4 or 5 times a year (Perth). The day and hour of presentment is marked on the Sasine and the Minute Book is made up from the Record Volumes (Lanark). The date of presenting is marked on the Sasine; thereafter the Sasine is

engrossed and the Clerk makes up the Minute Book while his memory is fresh (Renfrew). Sometimes the Sasine is minuted first, more frequently it is not (Stirling); and jottings are made at time of presenting, then the deeds are entered in the Record Volume, and thereafter the Minute Book is made up from those loose jottings (Aberdeen and Dumbarton).

On account of communis error, judgment in favour of the claimants was a foregone conclusion. The Court had no alternative, unless it was prepared to make itself responsible for causing widespread damage to property holders all over the country. A similar decision was pronounced in the case of Sir Alexander McKenzie and others v McLeod (*supra*), and in the case of Earl of Fife v Gordon (8 May, 1774).

Worse, however, was still to follow. So far, in those districts where negligence had been practised, at least a Minute Book was kept. There was only one way by which the performance noted above could be bettered, and that was by keeping no Minute Book at all. This was achieved in the County of Caithness. In *re Dunbar v Sutherland*⁽¹⁾ the Court after great difficulty and by a narrow majority sustained the claim for enrolment of a claimant whose Sasine had

(1) 1790, M.8799.

only been engrossed in the Record Volume of the County of Caithness, no Minute Book, on the statement of the Keeper, ever having been kept for the County since the passing of the Act of 1693, c.23.

There were two more cases to come before the Court before this dismal chapter was closed. The facts in both were, but for one particular, the same. In the one case, that of Drummond v Ramsay⁽¹⁾, where there were erasures in the Certificate of Registration and in the date of the Record itself, and where the Sasine also was engrossed out of its order of the Minute Book, the freeholders won their case in the Second Division on the arguments that an error in the attestation of the date of registration is a vitiation in substantialibus of the Sasine, and that a Sasine not entered according to the order of the Minute Book, as is expressly required by the Act of 1693, c.23, was not validly recorded. In the other case, that of Adam v Duthie⁽²⁾, which came from the same County but which was heard in another Division of the Court, there was an exact repetition of the same incidents which took place in the former case, except that the objection which occurred there from the vitiation of the Certificate of Sasine had not

(1) 24 June, 1809, F.C.

(2) 19 June, 1810, F.C.

arisen. Nevertheless a contrary judgment was pronounced in Adam's case, although the Keeper of the Register did not escape scot free.

In deciding the case of Adam the Bench were of the opinion that the date prefixed to the copy of the instrument in the Record was unnecessary and "bad practice" and therefore ought to be treated as pro non scripto; and that the entry in the order of the Minute Book was not inter substantialia of the Record, as all the law required was a reference from the Minute Book to the Register by the number of the Volume and the folio where it was copied. With this as their background the Bench held that the attestation on the back of the deed was regular and corresponded with the entry in the Minute Book, and that, the deed and entry in the Record corresponding, every requirement for complete registration had been fulfilled.

As the only material difference between the two cases was the vitiation of the Certificate of Sasine, we can only infer that this factor carried weight with the Judges. Nevertheless it is worth pointing out that the view taken in Adam's case, that a reference in the Minute Book to the Book of the Record Volume was all that the law required in this matter, was precisely the same plea put forward by the

claimants in the case of Drummond, and one which was rejected by the Lord Justice Clerk and Lords Newton and Glenlee.

In the face of those happenings which we have just mentioned, conveyancers at that time were bewildered, and we cannot better express their state of mind on the subject of what constituted effective registration than by quoting the rather depressing conclusion of one of them, which ran, "It is thus necessary to correct the opinion founded on the terms of the Statute and to make allowances for the gross negligence that has crept into practice, and although complete registration may be said to consist of the entry in the Minute Book, properly attested by which the date of registration when followed by a corresponding entry in the Record Book is proved, yet it has been necessary in connecting public expediency with the slovenly practices of the Keepers to hold the registration to consist in the actual entry in the Registers, and to allow the date of registration to be regulated by the certificate on the back of the Sasine in whatever way the whim or indolence of the Keeper may have chosen to ascertain that date." (1)

(1) Bell's Election Laws, 269.

Making allowances for the pessimistic strain running through the above quotation, it may be said that it was not very wide of the mark. In view of the decisions noted above no one, at that time, could with any confidence have laid down the law governing registration of writs in any precise form. The safest conclusions that could be drawn at that time on this head were, First, that the Instrument must be engrossed in the Record Volume, and that an omission of any material part of a deed in the Record was fatal to the registration: Second, that the presentment of the deed must be entered in the Minute Book in the terms required by the Act of 1693, c.23, and thereafter engrossed in the Record Book in the order of the former; but where the Minute Book had been irregularly kept, the Certificate on the Sasine, if corresponding with the Minute Book, would be held as evidence of the registration; and where, as in the County of Caithness, no Minute Book was kept at all, it was enough to show that the Sasine was duly presented for registration, which was done by producing the attestation of the Keeper, marked on the Sasine. On account of the last two cases referred to another caveat had to be made. Therefore where a Sasine had not entered the Record in due order of the Minute Book, the regularity of registration was surrounded

by a question mark, and more particularly if the Certificate of Registration was vitiated as well.

Lastly, the date of registration was shown by the date of presentment in the Minute Book, which date was independent of the actual time of inscription in the Record Volume, even although the inscription may have been delayed or postponed beyond the 60 days of the date of the Instrument.

The last occasion on which the rule last above mentioned was unsuccessfully challenged was in the case of *MacLaine v MacLaine*.⁽¹⁾ This case is also worth remembering for the fact that an objection taken to the registration of the *Sasine* on the ground that the name of a party was mis-spelt in the Minute Book was repelled. The question of what type of error, if any, in the Minute Book would invalidate a registration was not discussed by the Bench in this case; but we may safely infer that the Minute Book ought to be regarded more from the standpoint of fixing the date of registration and that it is to the Record Volume alone that we look for the accuracy of the Record. It is as well to note, however, that the Minute Book must be more than a mere blank. In *re Park v Wood's Trs.* (10 July, 1838, 16 S.1363) the

(1) 16 June, 1852, 14 D.870, affd. 6 July, 1855.

Court held that an Inhibition had not been recorded against certain parties whose names were absent from the Minute Book of the Register of Inhibitions, despite the fact that the omission was not repeated in the Record Volume.

It appears that an opinion was at one time prevalent that pari passu ranking was obtained by lodging two deeds at the same time for registration. Stair's Editor was doubtful of this proceeding.⁽¹⁾ This illusion was, however, dispelled by the decision given in *Douglas v Dunlop*.⁽²⁾

In conclusion we would remark that although litigation arising out of our system of registration has been truly enormous, perhaps exceeding all reasonable expectations, it has not been a case of wandering in the wilderness. Thanks to this litigation every possible aspect of our system of registration has been examined and every nook and cranny of it explored.

When we come to discuss future legislation on registration we shall see that the experience derived from these legal tussles was not lost on our legislators.

(1) Stair's Institutes, Vol. I. p.clxiv.

(2) 21 Feb., 1835, 13 S.505.

CHAPTER 4.RATIONALISATION OF THE PRACTICE OF REGISTRATION
IN THE 19th AND 20th CENTURIES.Section 1. KEY TO THE REGISTERS.

Since the introduction of the Minute Books about a century and a half had elapsed without any change in the process of registration. Then Indexes of Persons and Places to the Minute Books were introduced. Why this necessary labour was so long in being undertaken requires some explanation.

During the period referred to there had been no economic changes of the kind which could possibly have increased the numbers of land proprietors. But beginning with the close of the 18th century, and gathering momentum during the first half of the next one, came the industrial revolution which made Britain the workshop of the world, one result of which was that industry concentrated itself in the large factory instead of in the small back-rooms of the old-time weavers and other hand workers. The factory owners needed land-sites for their factories and houses for their workers. These circumstances and the creation of new wealth on a scale

hitherto undreamt of in a country which was formerly greatly agrarian, and its distribution through the various strata of an urbanised population which clustered round the industrial centres, led to a quickening in commerce in land as well. The ramifications of this development were widespread. It is a feature of every stage of industrial progress that the saving of time on mechanical processes leads to a demand for a like saving of time in every other sphere of life. People who have saved time and expense in one direction want to derive the same benefit from every transaction they are obliged to enter into.

As is well known, no person will buy land unless he be given an assurance that his purchase is free from incumbrances. Thanks to our system of registration we have the means of finding out what burdens - apart from some exceptions - are attached to any given piece of land. This, however, takes time, and even to-day, when the process of searching has been very much perfected and speeded up, a certain amount of delay is inevitable before the complete results of the labour of a searcher can be exhibited to a purchaser. Before Indexes of Persons and Places were compiled for the Minute Book, the method available for making a search was by means of marginal references written opposite to the entries in the Minute Books.

A brief but excellent account of this old-time method is given in the Report on the Land Registers issued in 1858 by the S.S.C. Society.

When transactions were comparatively few in number the task of searching the Minute Books without proper Indexes was possible, though even then it must have been difficult and laborious. But when transactions in land increased, as they did when the industrial revolution was in full swing, the task of searching without some short cut to the Register became well nigh impossible.

To illustrate how real the increase was during half a century of industrial and commercial expansion we give below the following Table, shewing the number of writs registered for 5 decades, beginning with the year 1781 and ending with 1830. We have chosen the Counties mentioned in this Table because they almost form the middle belt of Scotland.

Years	Stirling	Perth	Glasgow	Renfrew	Lanark
1781-90	1920	2399	1460	2802	1770
1791-1800	2116	2257	2431	3371	2153
1801-10	2544	2844	4176	3701	2353
1810-20	3200	3427	5325	5741	3331
1821-30	3734	4135	6945	6472	4027

From this compilation it will be seen that, apart from a slight decrease on the figures for Perth for the second decade only, the number of writs presented for registration continued to mount steadily.

These figures indicate that all previous methods for undertaking the work of searching had grown out of date.

~~It may be said here that the difficulty of~~ searching without some key had not escaped the attention of Keepers of the General Register of Sasines even at the commencement of their Register and they have to be commended for indexing that Register under names of persons from the year 1617 to 1720; whereas their colleagues who kept the Particular Registers never gave proof of any such initiative. Why the Keepers of the General Register brought such a useful labour to an abrupt close is not very clear to us. ~~At any rate the facts are that~~ ⁴from 1720 until the Act of Sederunt of 10th July, 1811, none of the Minute Books, which were the foundation of every search of the Registers, was provided with any Index, either of Persons or Places. The Act just referred to not only provided that all the Keepers of the Registers should frame Indexes of Persons and Places to each volume of the Minute Book, but, what was equally important, that the Minute Book itself should

be framed on a regular and uniform plan.

The provisions of this Act, which looked well on paper, unfortunately did not work out well in practice. Uniformity of the Minute Book was only possible if all its compilers had received systematic training under one directing mind. As this was impossible under a system which was, so to speak, split up into independent units, the Minute Books varied greatly in form. Moreover, some of the Keepers of the District Registers failed to carry out the injunction to make Indexes. Consequent upon this fiasco the Government turned to Mr Thomas Thomson, the Deputy Clerk Register of that time and one of our greatest Record scholars, for help.

Mr Thomson's plan, which he unfolded in his 14th Report, in the year 1821, was that the whole of the writs recorded, both in the General Register and the Particular Registers, were to be treated as forming one chronological series, and then classified according to their chronological order in county arrangement, corresponding to the counties of Scotland. After being classified in this manner an Abstract or Abridgment was to be made of each writ, containing the names and designations of parties, and a description of the lands or interest affected, together with other minor details. To facilitate reference to the

Abridgments, and through them to the Record Volumes, 2 Indexes, one containing the names of all persons and the other containing the names of all places appearing in the Abridgments, were also to be compiled, each entry in these Indexes bearing the running number of the Abridgment to which it referred.

His plan was accepted, and with the sanction of the Record Commissioners the work of compiling these Abridgments was begun in the year 1821, the starting point being the 1st day of January, 1781, so as to furnish a series of abridgments for the prescriptive period of 40 years. One change was made in his original plan, and that was in regard to the making of a separate sub-division for all writs applicable to lands in the Barony and Regality of Glasgow. This alteration was justified on the score of the size of this area.

Owing to inadequacy of staff the preparation of the Index of Places was for a time discontinued, and there are, therefore, no Indexes of Places in the Register House for the years 1831 to 1871. Otherwise, the Abridgments with their relative Indexes were completed for each county until the arrangement which was made possible by a provision in the Land Registers Act of 1868 was carried out. Under section 9 of that Act the Lord Clerk Register was

granted power to direct that the Abridgments should cease to be printed separately from the Minutes, and in lieu of the preparation and printing of the Abridgments the Minutes should be printed under the superintendence of the Keeper of the General Register of Sasines. The arrangement foreshadowed by this section came into force in the year 1891, and accordingly since that time the Minute Books for each county have been printed and indexed as nearly as possible contemporaneously with the registration of the writs, and are issued in yearly volumes with relative Indexes of Persons and Places prefixed.

Section II. OBJECTIVES OF THE CONVEYANCING REFORMERS.

Prior to the industrial era feudal principles and the practice derived therefrom were in harmony with the economic life of Scotland. At that time nobody found them irksome or out of date. But when mechanical progress, already mentioned, transformed the basis of our economic life, most people were in a different mood, and the same causes which gave a fillip to the demand for more rapid and accurate methods of searching also stimulated a desire for the reform of our system of conveyancing.

At first, the reaction to the demand for reform was one which might have been expected. Legal men found themselves ranged on opposite sides. On the one hand there were those, numerically not very strong, who thought that little change, if any, should be made on our system of conveyancing.⁽¹⁾ On the other hand there were the enthusiasts who proposed that sweeping reforms should be instituted forthwith. Others halted half-way between these two irreconcilable opinions. The latter section counselled that the necessary reform should be carried out with caution and by gradual stages. It was, perhaps, fortunate that the compromisers carried the day, because the extremists were swayed more by zeal than by discretion.

On one item in the programme of reform there was almost general agreement, namely, that the ceremony of symbolical delivery was out of date and that it no longer served any useful purpose. Having advanced so far, some legal men wanted to go a stage further, and they saw no practical reason for retaining the Instrument of Sasine as a combining link in the chain of infeftment. Their justification for this proposal was that the Instrument of Sasine merely

(1) Letter by Colin Mackenzie to Sec. of State, on inexpediency of abolishing Sasines, 1830.

amounted to an attestation by a notary that a ceremony had been performed, which added no weight to a title, seeing it was preceded by a warrant which defined its tenor. If it deviated from its warrant, the Instrument of Sasine was nothing, and yet any error in it might upset title. The time had now come, they urged, for pruning title of this intermediary and finding a cheaper substitute to fulfil its function.

The quest for likely expedients produced a crop of proposals, many going so far as to recommend the direct recording of the warrant in the register. On studying some of the outstanding proposals which were put forward at this time, one cannot help noticing a feeling on the part of their authors that they were taking a leap into the unknown. For instance, Stair's Editor suggested that the charter or warrant for infeftment might be inserted in the Register, which step should be held equivalent to taking of infeftment and the registration of the instrument of the Sasine, but then he added, subject to the proviso that the Notary should collate the register with the deed.⁽¹⁾ It will be noted that if this proposal had been adopted the Notary would have shared responsibility for the accuracy of the Register.

(1) Stair, edited by John S. More, p.clxv-1.

Mr Duff,⁽¹⁾ who was also one of the abolitionists, had quite a different proposal. "Because," as he said, "the practice of copying the writ into the record has given rise to considerable litigation, produced by the blunders of persons over whom the parties have no control" he would have done away with the engrossment of the deed in the record volume. In place of copying the deed it would be presented to the Keeper of the Register in duplicate and then compared by him with the agents of the parties. After comparison, he added, the duplicate was to be bound up in the Record Volume, its place in that Volume corresponding with the Minute Book. To safeguard the duplicate from being destroyed or marred by the public, he also advocated that a copy of the principal register should be made for the use of the public.

The attractive feature of these proposals was that an action of proving the tenor would in every instance have been rendered unnecessary, since any extract issued by the Keeper would have fallen to be made from a properly authenticated duplicate which had been carefully compared, prior to its being deposited in the register.

(1) Feudal Treatise, p.82.

The objections to Mr Duff's proposals were the same as might have been urged against the previous scheme, namely, duplication of labour and unnecessary expense.

Perhaps the most striking proposals were contained in a Bill which was brought before Parliament in 1831 by Sir William Rae. This Bill aroused a great deal of discussion at the time. This discussion, if it did nothing else, showed the fallacy of abolishing the Instrument of Sasine without providing some workable substitute to take its place. The salient feature of this Bill was that Sasine should be given in the office of the Register by delivering the warrant of infeftment to the Keeper, whereupon a Minute, called the Minute of Infeftment, was to be entered in the Minute Book, setting forth the exact time when and by whom the warrant was exhibited, and also that infeftment in the subjects disposed by the writ was given to the designated disponee by its delivery to the Keeper. This Minute, when signed by the person who delivered the writ, the Keeper, and two witnesses, was to complete infeftment. Then followed an enactment, which outstripped Mr Duff's proposal. The warrant so delivered behaved, according to a party's choice, either to be booked in the Register or retained by the Keeper, and bound in a Volume

termed the "Record of Infestments". The chief shortcomings of this measure were, however, manifested in the provisions which were designed to overcome the complications encountered in those not unusual cases, where it is not deemed desirable to exhaust the warrant.

Objectors were not slow in seizing upon the glaring defects of the Bill. One critic⁽¹⁾ animadverted upon the incongruity of taking infestment by delivery in the office of the Keeper, upon a warrant which was directed to a Baillie to proceed to the ground and there give heritable state and sasine by earth and stone. He also wisely pointed out that no Keeper could afford to devote the time required for examining the warrant and checking the Minute of Infestment, without dislocating the normal routine of his department. Another critic⁽²⁾ of the Bill deplored the breach in the uniformity of the register which would result by giving a party the option of having his deed booked and returned, or left in the hands of the Keeper; and, touching the kernel of the problem, the same critic also drew attention to the

(1) Art. on Bill, Edinburgh Law Journal, Jan. 1831 - Jun. 1832, 49.

(2) Pamphlet, Remarks on Bill, 1831. Printed for Adam Black.

fact that under the proposed system there would have to be recorded every part of a deed, however unconnected with the object for which infeftment was taken, including lengthy clauses of a family settlement which it was often prudent to keep out of the Record.

Section III. STATUTORY CONVEYANCING IN RELATION
TO THE REGISTERS.

INTRODUCTORY.

The next development in the demand for reform was the Report of the Law Commission, appointed in 1837. By this time practically everybody was satisfied that symbolical delivery had to be eliminated, and the majority of legal opinion was also reconciled to the retention of the Instrument of Sasine in those contingencies where it could not very well be done without. It may also be said that in principle most people favoured direct registration of the warrant, providing this could be done with safety. The Commissioners were greatly impressed by these views, and their Report, which was issued in 1838, was in essence a reflex of the most influential opinion of that time.

An interval of 8 years elapsed before any of the reforms recommended by the Commission was put on the Statute Book. However, once a beginning was made, one Act followed another in rapid succession, with the final result that many unnecessary proceedings have been abolished or superseded, and short forms of writs substituted for the burdensome and verbose deeds which were formerly the products of our system of conveyancing. From an intellectual point of view, conveyancing has, as a result of the statutory conveyancing which was initiated under the guidance of this Commission, become more a science than an art; and our modern deed is, as it were, a scientific formula for ingredients which are detailed in Acts of Parliament.

So far as the Register of Sasines is concerned, the subject matter of registration has been almost entirely altered by statutory conveyancing. Before statutory conveyancing was in full swing, with the exception of a minority of writings, comprising such deeds as Renunciations, Discharges and other writings where infestment was not required, every deed which entered the register was an Instrument of Sasine and the Record was, therefore, primarily a Record of the acts of a notary. Now the reverse obtains. The acts of a notary or his statutory equivalent form the

lesser portion of registrable matter, and the register is now a Record of originals. The title "Register of Sasines, &c." by which the register is still known is really now a misnomer, and is merely symbolic of its past history. Our system of registration is also indebted to statutory conveyancing for the incisive manner in which it re-stated the process of registration and defined the effect to be given to every step in that process.

(a) Abolition of time-limit for registration.

In the year 1845 two important measures were introduced by Lord Colonsay (then Lord Advocate) and passed by Parliament.

The first of these Acts, popularly known as the Heritable Securities Act of 1845 (8 & 9 Vic. c.31), introduced a very short form of deed for transferring heritable securities constituted by bond and disposition ^{and} security, which, when registered, had the effect of transferring the heritable security "as effectually as if such heritable security had been disposed and assigned and the disposition and assignment or conveyance had been followed by sasine according to the present law and practice".⁽¹⁾ It was a partial fulfilment of a recommendation of the

(1) S.1.

Commission. In passing it may be remarked that the Edinburgh Chamber of Commerce took an active part in hastening its introduction. By section 6 it was enacted that all assignations or conveyances of heritable securities constituted according to the Act may be registered at any time. This Act also introduced the Writ of Acknowledgment by a debtor in favour of the heir of his creditor (sec. 2); a form of Notarial Instrument to be used by an heir or general disponee without the intervention of the superior (sec. 4), and provided that adjudgers may complete title by recording an abbreviate in the Register of Sasines (sec. 3); but as none of these writs was mentioned in section 6, it remained a doubtful point whether the benefit of the extended period of registration conferred on assignations or conveyances or heritable securities was extended to them.⁽¹⁾ Nothing on this head was said regarding discharges.

The second of the measures above referred to, popularly known as the Infektment Act of 1845 (8 & 9 Vic. c.35), was a recommendation of the Commission. It abolished the ceremony of symbolical delivery, and introduced a new form of Precept of Sasine, which authorised any Notary Public to whom the warrant was

(1) W. Alexander: Analysis of the Heritable Securities Act and Infektment Act of 1845, p.21.

delivered to give sasine. In the form of Instrument which was appended to the Act (like its successors the Notarial Instrument and the Notice of Title) no date was required, as there was now no ceremony to be narrated. The Instrument of Sasine, if drawn in the form given by the Act, might be recorded at any time within the lifetime of the party in whose favour it was expedite (sec. 3). But, on a par with many of the innovating enactments contained in later conveyancing statutes, this Act did not prohibit the use of the older, i.e. private type of Instrument of Sasine or the ceremony which it published to the world. Accordingly, were the obsolete form to be used, it would still be required to be recorded within the time limit fixed by the Act of 1617.⁽¹⁾ There was one kind of Sasine, however, even after the Act, which was bound by special conditions as to the time within which it might be registered. We refer to Sasine taken on a Precept of Clare Constat. Under our former law a Precept of Clare Constat from a subject superior to his vassal, as not coming within the provisions of the Act of 1693, c.2 (ix, 331), was held to lapse if Sasine thereon was not passed within the lifetime of the granter. Under section 15 of

(1) Menzies, 564.

the Land Transfer Act of 1847 this anomaly was abolished, and it was then made competent to record the Sasine at any time within the lifetime of either party.

Under the Heritable Securities Act of 1847 (c.50) it was made competent to grant a bond and disposition in security in the abridged form scheduled in the Act, which being registered in the Register of Sasines was held to be "as effectual and operative to all intents and purposes as if Sasine had been duly made, accepted and given thereon in favour of the original creditor, and an Instrument of Sasine had been duly recorded at the date of the registration of the bond and disposition and security".⁽¹⁾ By section 6, such bond might be registered during the lifetime of the grantee. The privileges granted by the Heritable Securities Acts of 1845 and 1847 were extended to "all heritable bonds and to all deeds, which according to the existing law and practice, required to be followed by infeftment in order to constitute a security over lands" (17 & 18 Vic., c.62, sec.1).

So far, the Instrument of Sasine was still required to complete infeftment in the case of irredeemable rights. But under the Titles to Land (Scotland) Act of 1858 (c.76), which was introduced in Parliament

(1) S.1.

by Lord President Inglis (then Lord Advocate Inglis), irredeemable rights were put on the same footing, in regard to this matter, with redeemable rights. The leading enactment (sec. 1) declared that it shall no longer be necessary to expedite and record an Instrument of Sasine on any conveyance of lands, but that it shall be competent to record the conveyance itself in the Register of Sasines, which when done "shall have the same force and effect in all respects as if the conveyance so recorded had been followed by an Instrument of Sasine duly expedite and recorded at the date of recording the said conveyance, according to the present law and practice". Under section 4 the expediting and recording of an Instrument of Resignation ad remanentiam was rendered superfluous. In its stead, the Procuratory of Resignation ad remanentiam, or the disposition containing an express clause of resignation or a Notarial Instrument (Schedule B), might be recorded direct. This Act also authorised other forms of the Notarial Instrument, as well as the Writ of Clare Constat. Under section 19, all conveyances - the term conveyance having a very wide meaning attached to it (sec. 36) - procuratories of resignation ad remanentiam, Notarial Instruments and Instruments of Resignation ad remanentiam were released from the time limitation of the Act of 1617,

and, like redeemable rights and Instruments of Sasine, might be recorded in the lifetime of the party on whose behalf they were presented for registration.

All of the above Acts - in the case of the Infertment Act of 1845, section 6 only - were repealed, but substantially re-enacted by the Titles to Land Consolidation (Scotland) Act, 1868. Under Section 142 of that Act the restriction of the Act of 1617 was finally removed and all writings recorded in the Register of Sasines, with the exceptions mentioned below, may now be recorded at any time in the life of the person on whose behalf they are presented for registration.

The exceptions are: first, titles to land acquired under the provisions of the Land Clauses Consolidation Act of 1845 (c.19), which require to be registered within 60 days from the last date thereof, if they are to confer a statutory title within the meaning of that Act (secs. 74, 76 and 80)⁽¹⁾; and, second, Crown Writs of Clare Constat or Precepts from Chancery, which are null and void unless recorded before the first term of Whitsunday or Martinmas next after their date (Consol. Act, sec.86). Owing to a defect in the Titles Act of 1858, the position with regard to the final date of recording Crown Writs of

(1) Heriot's Tr. v Caledonian Rly. Coy., 1915, S.c., (H.L.), 52.

Clare Constat, between the years 1858 and 1868, was rather doubtful.⁽¹⁾

(b) Register of Sasines becomes a Register of Principals.

As previously stated, the Commission of 1837 was in favour of introducing direct registration for redeemable rights, but not so for irredeemable rights. The great hopes that were raised in some quarters in the early part of the 19th century for the universal application of the principle of direct registration were quickly dispelled when prudent conveyancers got to close grips with the subject. They were not long in discovering that the Notary's deed might be changed in form to suit changes in the law, but that there were many instances where it could not be dispensed with.

As will have already been gathered from the contents of the preceding sub-section, direct registration was first generally applied by the Heritable Securities Act of 1845, and then developed through the Heritable Securities Act of 1847, the Heritable Bonds Act of 1854 (17 Vic., c.62) and the Titles to Land Act of 1858. The evolutionary trend of this

(1) Vide Hendry's Manual of Conveyancing, 3rd Edition, p.501. Handbook of Conveyancing, Burns, 1900 Edition, p.458.

legislation shews that our legislators were not unmindful of the fact that one has to creep before one can begin to walk. Evidently they acted on the principle of safety first. Indeed, almost every change which has been initiated in the sphere of conveyancing has been accompanied by the proviso that older methods might still be followed.

Coming down to our own times, fuller knowledge and a wider experience have taught us that in many instances the Notarial Instrument or the Notice of Title is just so much dead wood, which might with advantage be cut away. The fruits of this wisdom may be seen in several enactments contained in the Conveyancing Act of 1924 (c.27). Prior to the 1924 Act the efficacy of direct registration was dependent on the granter of a deed being himself infeft. "This was a rule to which there was no proper exception." Section 3 of that Act compels us to view this rule from quite a different angle, because it provides that infeftment may be obtained by the direct registration of a disposition of land or an assignation of a heritable security by a person uninfeft, who in such writ deduces his title, in the manner indicated in the Act, from the person last infeft. The lever of this enactment is the deduction clause given by the Act, which, as it were, assumes the role formerly

played by a Notarial Instrument recorded on behalf of the granter. Under the section, in similar circumstances, a discharge or restriction of a heritable security may also be recorded de plano. But it is to be noted that writs constituting a feuduty and bonds and dispositions in security would appear to be excluded from the scope of the enactment on account of the opening words of the section and the meaning attached to the term "lands" in the interpretation clause of the Act.

The cumulative effect on the complexion of the register of the above enactments dealing with direct registration has been remarkable. Until the Instrument of Sasine was superseded by direct registration, the homogeneity of the register was little disturbed. We say little, because there are one or two variances to be noted. Originally writings constituting reversions were recorded direct, though these by later practice followed the custom which prevailed in the constitution of all other rights, where infeftment was required. It had always been the invariable custom, however, to record Discharges and Renunciations, or deeds of a similar nature, directly into the register. Statutory instances of direct recording before the Heritable Securities Act of 1845 have also to be mentioned, but they covered a very narrow

range. In connection with the building of the Caledonian Canal, an Act was passed in the year 1803 (43 Geo. III., c.102). Under section 10 of that Act it was provided that the dispositions to be granted to the Commissioners on acquiring land for their undertaking should be recorded direct, but in the Particular Register only for the district in which the lands lay. On registration, this disposition was "to receive the same effect and be valid and effectual to all purposes as if a formal disposition had been granted and followed by Charter and Sasine". This was the first instance of direct registration taking the place of infeftment. This method was next sanctioned by the Land Clauses Act of 1845 (sec. 80); but here again its operation was restricted, this time to dispositions of lands acquired for undertakings or works of a public nature.

(c) Shortening of writs through prior registration.

(1) Statutory description.

For reasons which are self understood there can be no rigid rule laying down the manner in which lands should be described in a deed. All that is necessary is that the subjects should be described in such terms as to make clear what is and what is not being conveyed or burdened. When a property has

been held in continued possession by one or more prior authors, without opposition from neighbouring proprietors, the average acquirer of that property will normally act on the assumption that what was good enough for former owners will do for him. There do arise occasions, however, when archaic descriptions give rise to so much confusion and uncertainty that their modernisation becomes an urgent need. In these circumstances, the question that confronts the careful conveyancer is how to amend or shorten the description, consistent with absolute safety to his client.

Statutory conveyancing, relying on the aid of the Registers, has solved this problem for him by permitting references to previous recorded deeds. Prior to this statutory novelty, conveyancers had also been in the habit of making references to particular descriptions of land contained in former titles. The method which was then usually adopted was to give some leading name or names in conjunction with the reference. But our statutory short cuts are much superior, in respect that they are more watertight. The only drawback of the statutory description - if it can be called a drawback - is that the instructions of statute must be strictly adhered to, but then one cannot expect a benefit without

paying a price.⁽¹⁾

The first enactment with regard to the description by reference was contained in the Titles Act of 1858 (sec. 15). This section required a specification of the "leading name" or other short distinctive description of the lands, and the parish as well as the county in which the property lay, all in conjunction with a reference to a recorded deed containing a particular description. The latter half of the section provided that a reference description may itself be utilised for reference purposes in subsequent deeds. This provision was fortunately not repeated in any later Act. On perusing the relative Schedule appended to the Act (L.I.) it will be observed that the following particulars of the deed referred to required to be inserted in the reference description, namely, grantor's, but not grantee's name, date of deed, division of the register where recorded, and date of recording.

Section 15 of the 1858 Act was repealed by section 34 of the Titles Act of 1860. The latter section dispensed altogether with the leading name or distinctive description and the parish. The leading name was restored to favour by section 11 of the

(1) Leslie & Wood, 2nd July, 1887, 14 R.856.

Consol. Act of 1868. After 1874, statutory descriptions by reference were regulated by section 61 of the Conveyancing Act of 1874. This section reverted to the terms of the Act of 1860, and further, in order to prevent challenge of faulty descriptions by reference under the former Acts, it provided "that it shall not be competent to object to any specification and reference to any particular description of lands contained in any conveyance, deed, or instrument recorded prior to the commencement of this Act, provided such specification and reference states correctly the name of the county in which the lands are situated, and refers correctly to the prior recorded deed or instrument containing the particular description of such lands".

It had been suggested that where lands whose descriptions were given by reference lay in more counties than one, the description by reference ought to show precisely the county locus of the several parts.⁽¹⁾ Why this suggestion arose is not quite clear to us. The Act of 1874 contented itself with an identification of the property by reference to a prior writ without any further addendum. Attention ought to be paid, however, to the fact that the boundaries of

(1) Vide Menzies, 510.

certain counties and parishes of Scotland were changed by the Local Government (Scotland) Act of 1889 (sec. 44). Where the situation of lands has been altered in respect of county by this Act, they should be described as "lying formerly in the county of ... "and now in the county of ... ".

The latest enactments on the head of statutory description are contained in the Conveyancing Act of 1924.

This Act (sec. 8) inter alia removed any objection which may be taken to a description by reference to a particular description of land in accordance with section 61 of the 1874 Act, on the ground that the description referred to contains a description by reference of a larger piece of land of which the land particularly described forms part; repealed the Schedule relative to reference descriptions appended to the 1874 Act, substituting therefor one of its own with accompanying instructions; and also brought Instruments of Disentail within the scope of section 61 of the 1874 Act. This last mentioned provision was rendered necessary because the Instrument of Disentail in the form scheduled in the Entail Act of 1848, required a description in full of the lands disentailed.

A very useful provision was contained in section 48 of the 1924 Act. One may now lodge a duplicate plan for retention in the Register. Prior to the

granting of this facility the register was of little or no help for purposes of consultation where subjects were described by reference to a plan. Nowadays, however, with the photo-stat process in operation, plans of suitable size are reproduced along with the writs themselves as a matter of normal routine.

All these changes, however, are overshadowed by the shortening of writs effected under section 31 of the Act. That section dispenses altogether with a description of subjects in the case of Assignations and Discharges of bonds and Writs of Acknowledgments. It also renders deductions of titles unnecessary in the same class of writs, if such granter holds, or the deceasing creditor held, as the case may be, a recorded title, and the date is given of the recording of same in the manner prescribed in note 2 to Schedule K to the Act. The requirements of the searcher are safeguarded by the saving clause of the Act (section 49, sub-sec. 2) which, in effect, enacts that the Keeper of the Register shall from his own sources supply the information for the printed minutes and relative indexes which the searcher needs.

There is still another type of statutory description by reference to be mentioned, which was introduced by the 16th section of the Titles Act of 1858,

and which is now regulated by the 13th section of the Consol. Act of 1868. Where several lands are comprehended in one conveyance in favour of one person or persons, a clause may be inserted declaring that all the lands therein particularly described shall be designed and known in future by one general name to be therein specified. The value of this procedure is that one may use the general name alone for describing the lands in all future deeds relating to the whole property, provided it is coupled with a reference to the deed wherein it was first promulgated, in the manner detailed in Schedule G. to the Consol. Act.

(2) Reference to Reservations, Conditions, &c.

Until 1847 it was necessary to insert the reservations, conditions, prohibitions, etc., of an original grant in all transmissions, sasines and infeftments. A mere reference was not sufficient. Section 5 of the Service of Heirs Act, 1847, provided that in cases of Special Service, where lands were held under a deed of entail, it should be competent in the petition of service and in decree following thereon, and in the precepts, sasines, or other instruments necessary to complete investiture of the lands, to refer to the conditions and provisions of the deed of entail and its prohibitory, irritant, and

resolutive clauses, as being set forth at full length in the deed of entail itself, if the same had been recorded in the Register of Entails, or as set forth at full length in any recorded sasine forming a part of the progress of title-deeds of the lands held under such entail. The same Act made a similar enactment with respect to all cases of special service, where lands were held under any real burdens or conditions or limitations.⁽¹⁾ The Lands Transference Act⁽²⁾ of the same year permitted the insertion of similar references in all other deeds and instruments of whatsoever nature which were necessary to transmit, renew, or complete a title. The like benefits were applied in the cases of bonds and dispositions in security and Crown Charters and Precepts by the Heritable Securities Act⁽³⁾ and the Crown Charters Act of 1847⁽⁴⁾ respectively.

The Titles Act of 1858 contained no new enactment on this head, beyond making provision for dispensing with the full repetition of the destination in a deed of entail and the insertion of the three cardinal prohibitions, if the deed of entail contained

(1) S. 6.

(2) Sects. 4 and 5.

(3) Sec. 4.

(4) Sects. 26 and 27.

a clause authorising registration in the Register of Entails.⁽¹⁾ Prior to this Act the irritant and resolutive clauses might be omitted (Entail Act of 1848, s.39).

The Titles Act of 1860 extended the application of the rules above mentioned relating to deeds of entail, to excambions of entailed lands;⁽²⁾ and, in view of the supersession of the Instrument of Sasine, re-formulated the provisions above mentioned relating to statutory references to real burdens, &c.⁽³⁾

All of the said enactments were re-enacted in somewhat wider terms by the Consol. Act (secs.9, 10 and 14); but section 10, in turn, was superseded by section 32 of the Conveyancing Act of 1874 which, subject to the amendments made by the Conveyancing Act of 1924, now regulates these matters. The same section of the 1874 Act introduced a method by which a proprietor of an estate may ensure that the conditions on which he is to feu or otherwise deal with his estate may be incorporated in original grants without their repetition.

Section 9 of the Conveyancing Act of 1924, in trend with the ameliorative policy pursued by that

(1) Sects. 17 and 18.

(2) S.27.

(3) S.31.

Act, made some very important alterations in the law governing references to burdens. As a result of this section it is now no longer necessary in heritable securities to insert any of the conditions or clauses affecting land, whether prohibitory, irritant, resolute or otherwise expressed in any writing (sub-sec.1). This was made retrospective (sub-sec. 2). Sub-sec. 3 removes any objection which might be taken to the title of the proprietor for the time being on the ground of a failure to repeat or refer to the conditions of the grant in some prior deed forming part of the progress of titles, providing his own title is free from that defect. On the other hand, if the omission occurs in his own deed he can remedy this fault by executing a deed of acknowledgment in terms of Schedule E to the Act (sub-sec. 4).

(d) Re-phrasing of the process of registration.

In our previous chapter we referred to the negligence of some Keepers of the Register, and also to the lack of clear understanding which prevailed for a long time, even among the legal public, regarding the precise function of each component part of the process of registration and the relation of these parts to each other. Decisions of the Court may have helped to remove many grosser misunderstandings;

nevertheless it became a matter of prime importance that the whole process of registration be re-defined in language which would remove any vestige of doubt.

The advent of conveyancing reform gave our legislators an opportunity of advancing this object. Some time elapsed, however, before any action was taken. The Land Clauses Act of 1845 and the Heritable Securities Act of the same year were silent on this matter. The Infektment Act of 1845 was just a case of marking time. Section 2 of that Act merely said, "Every such Sasine shall be recorded in manner "heretofore in use with regard to Instruments of "Sasine, and the keepers of the registers of sasines "are hereby required to receive and register the same "accordingly". But a more welcome note was heard in the Heritable Securities Act of 1847. Section 5 of that Act read: "Bonds and dispositions in security "presented for registration shall be forthwith "shortly registered in the minute-books of the regis- "ter in common form, and shall with all due despatch "be fully registered in the register books, and there- "after re-delivered to the parties with certificate "of due registration thereon, which shall be proba- "tive of such registration, such certificate specify- "ing the date of registration, and the book and folio "in which the engrossment has been made, and being

"subscribed by the keeper of the register, and the date of entry in the minute-book shall be held to be the date of registration." This enactment was made to apply to all heritable securities.⁽¹⁾

It will be observed that up to this point only the registration of security writs evoked a re-statement on the process of registration. With regard to irredeemable rights, no fresh utterance was made until the Titles Act of 1858 (sec.19) which emphasised that the date of entry in the Minute Book should govern the date of registration.⁽²⁾ This declaration was repeated in the Titles Act of 1860 (sec.13). All of the above enactments were superseded by section 142 of the Consol. Act, which re-defined the process of registration and the effect of registration as applicable to all classes of deeds.

One other comment might be made on this subject. It will be observed that the section of the Heritable Securities Act of 1847 spoke of the deed being "forthwith shortly registered in common form". This phrase was in a sense rather non-committal. Bearing in mind the difficulty of having a Minute of the deed ready for signature by the presenter at the time of ingiving of the writ, no doubt this phrase was used advisedly.

(1) 17 and 18 Vict. c.62, S.1.

(2) S.19.

Since 1868, there has been no misgiving on this score, as the ingiver of the writ only signs the presentment book.

(e) Securing the efficiency of the Register.

As a result of the judicial findings on the cases which came before the Court prior to the inauguration of statutory conveyancing, the principle of priority of registration conferring priority of right had been firmly established. All that now remained to be done was, figuratively speaking, to rope in any stragglers and make them trek the road to the register. Beginning with the Consol. Act of 1868 and continuing right down to our times, we find several enactments extending the power of the register. Thus, under section 148 of the Consol. Act, the date of registration of all conveyances granted or taken in pursuance of that Act was to be the date of such writs in all questions under the Bankrupt Acts in Scotland. Again, although it was bound up with other aims, section 4 of the Conveyancing Act of 1874 indirectly championed the cause of the register. This provision "vests the proprietor duly infeft as "the Charter or Writ of Confirmation previously did "with a complete feudal title to the lands". Until it was put on the Statute Book purchasers with an

a me holding ran certain risks, and the Act of 1693, c.22, had therefore not attained its full effect. These risks had previously been somewhat mitigated by the proviso at the end of section 6 of the Consol. Act, which enacted that where the titles contained prohibitions against subinfeudation and an alternative holding, or either of them, a conveyance should, if an entry in the lands therein conveyed were expedited with the superior within twelve months from the date of such conveyance, have the same preference in all respects from the date of recording the conveyance in the register of sasines as if it had contained a clause expressing the manner of holding to be a me vel de me. Yet another provision of the 1874 Act added to the efficacy of the register. Section 34, which reduced the period of positive prescription in normal cases to 20 years, also stipulated that the title on which prescription is founded must be a recorded one.⁽¹⁾ Finally, one must note several other enactments: one, contained in the Conveyancing Amendment Act of 1887,⁽²⁾ which stops a decree of declarator of irritancy ob non solutum canonem from becoming final until extract has been recorded in the register

(1) Amended by 1924 Con. Act, s.16.

(2) S.4.

of sasines; and its corollary (sec.23, sub-sec.(5) of the 1924 Act) relating to decree for arrears of ground annual; and, lastly, another provision of the 1924 Act (sec.46) which it was thought was intended to nullify the risk run by a bona fide third party acquiring title from an untrue heir.⁽¹⁾ But it has been held in the Outer House that the protection afforded by the Section only extends to persons acquiring rights during the interval between the granting of the decree of reduction and its disclosure on the record.⁽²⁾

(f) Mandate for registration.

We have already referred to the problems which were raised by the abolition of the Instrument of Sasine. The Instrument of Sasine differed very much from the deed which was its warrant. A conveyance may be drawn in favour of several persons or for varying interests, and in the absence of supplementary evidence a conveyance falling under this category does not by itself furnish any indication as to what party is able or willing to take infeftment under it, or what interests may eventually be capitalised. On the other hand, the Instrument of Sasine was quite precise on these matters. A point also to be remembered, is that the taking of infeftment has important legal consequences. This being the case it is essential that no one shall appear to be infeft in

(1) See Stobie v Smith, 1921, S.C. 894; Dr Wedderburn, Abridgment and Consol. of Con. Statutes, pp. 151-2; Burns, Handbook (4th ed.) pp.342-3.

(2) Mulhearn, (O.H.) 1929, S.L.T. 59.

land except on clear written authority. The Instrument of Sasine, but not an original warrant, necessarily bore evidence of that authority.

To ensure that nothing was lost through the abolition of the Instrument of Sasine, the warrant of registration was introduced. In essence, therefore, the warrant of registration is the equivalent of the old instrument, couched in the form of a mandate to the keeper of the register of sasines to give infeftment in accordance with its terms, just as the former Precept of Sasine was a command from the superior to his baillie to give delivery of possession to the vassal.

It will be remembered that the Heritable Securities Act of 1847 authorised the direct registration of bonds and dispositions in security. The form of bond scheduled to that Act contained a clause of consent to registration in the appropriate register of sasines. This clause was interpreted by section 2 as entitling the creditor to register the bond accordingly. The Act of 1854 (c.62) made it competent to insert the like clause in assignations, writs of acknowledgments and notarial instruments made and granted in terms of the Heritable Securities Acts of 1845 and 1847. This clause was thus an early makeshift for the warrant of registration, the latter

being introduced by section 1 of the Titles Act of 1858.

As already stated, section 1 of the 1858 Act rendered the Instrument of Sasine superfluous, and as an alternative declared that a "conveyance" might be recorded with a warrant of registration written on it, specifying the person on whose behalf it was presented for registration, and signed by such person or his agent.

The term "conveyance" received a wide interpretation under the Act; but it did not cover the Notarial Instruments which were introduced thereunder. Under the 1858 Act a Notarial Instrument might be used and recorded in either of the following cases only: first, where a conveyance of land was embraced in a deed for further purposes and objects, such as a Marriage Settlement; and, second, where a deed conveyed separate lands, or separate interests in the same lands and it was deemed advantageous to keep the titles separate. This restriction on the use of the Notarial Instrument caused great inconvenience in practice, and it was removed by section 17 of the Consol. Act of 1868. About the time when the Act of 1858 was passed, however, the Notarial Instrument was not a welcome stranger and in order to dispense wherever possible with the use of a Notarial Instrument

or an Instrument of Sasine, several alternatives were offered by that Act. Section 3 gave an option to the granter of the conveyance to detail what part of his deed he wished to be recorded, which, if he availed himself of it, he exercised by using a novel form of device called the "Clause of Direction".⁽¹⁾

Nevertheless, the grantee was not tied by the Clause of Direction. He was also given an option. If he wished he could have the deed recorded in its entirety, or, again at his option, he could expedite a Notarial Instrument, where he desired other parts of the deed to be recorded in addition to the portion embraced by the Clause of Direction. If he availed himself of the latter alternative, no part of the deed directed to be recorded was permitted to be omitted from the Notarial Instrument.

It cannot be said that the forms of warrant of registration scheduled to the 1858 Act were self-sufficient. Two forms of warrant were provided by Schedule (A): the first was applicable where only a conveyance by itself, or one which might have an assignation or writ of resignation (wrongly called writ of registration) endorsed thereon, was to be registered; and the other where a conveyance was presented for registration along with a separate assignation or Notarial Instrument. The second mentioned style

(1) Sch. C.

of warrant was not supplemented by any form of docquet, although the use of a docquet was contemplated.

Again, supposing the case of a deed containing a Clause of Direction, the Act afforded no precise guide to a grantee as to how he could make known his wish to have the whole of the deed recorded. In practice, however, a remedy was found.⁽¹⁾

Neither of the warrants scheduled to the 1858 Act specified the register in which the deed was to be recorded; but this was quite understandable, because at that period the place of presentment spoke for the register.

The Titles Act of 1860 made very few changes in respect of the warrant of registration. It remedied the defects of the previous Act bearing on the Clause of Direction (sec.25), and enacted that every deed containing a Clause of Direction should, if it were intended to be acted on, bear express reference thereto in the warrant of registration in the form of Schedule (K), and that in the absence of such reference the deed should be engrossed in its entirety.

Next we come to the Land Registers Act of 1868, and the Consol. Act of the same year.

The Land Registers Act wrote an independent

(1) George Ross: Analysis of the Titles Act of 1858, p.5.

chapter in the history of registration, which we shall discuss in the next section. At this juncture we shall only deal with it in so far as it continued the work begun by statutory conveyancing, omitting any reference to those changes which it effected independently. The warrant of registration, as we have seen, was a product of statutory conveyancing and not any registration Act. Touching briefly, therefore, meantime on the great changes wrought by the Land Registers Act, this Act will be cherished for abolishing the dual system of registration inaugurated by the Registers Act of 1617. It directed that the General Register of Sasines be the only appropriate register for the future and that it be kept in county divisions. Consequent upon the amalgamation of the Registers by the L.R.A. of 1868, it became necessary to give specific instructions to the Keeper of the Register directing him to the county in which a deed required to be registered. Accordingly, we find in Schedule (A) to the Land Registers Act new forms of warrants of registration which answered this purpose, and which superseded the warrants scheduled to the 1858 Act. Section 4 enacted that every writ presented for registration should have a warrant of registration endorsed thereon in, or as nearly as may be, the form of Schedule (A) No.1, specifying the person on

whose behalf it was to be presented and the county in which the lands lay, and signed by such person or his agent; or, in the case of an assignation of an unrecorded conveyance, a warrant of registration in the form of Schedule (A) No.2. Where a warrant of registration was signed by an agent, it might be signed either by an individual agent or by the subscription of any firm of which such agent was a partner.

The forms of warrant of registration we have just mentioned were adopted by the Consol. Act of 1868, and the terms of section 4 of the Land Registers Act were incorporated in the latter Act as well (sec.141). Section 4 of the Land Registers Act spoke of the Titles Act of 1858 as a subsisting act. Both the Land Registers Act and the Consol. Act received the royal assent on 31st July, 1868, but at the time the Registers Act left the House of Lords it was uncertain whether the Consol. Act could be passed through both Houses of Parliament before the end of the session, hence the reference in the Land Registers Act to the Titles Act of 1858 as a subsisting act. As the reference to the 1858 Act was no longer applicable, section 141 of the Consol. Act was the one by which this matter was regulated until the passing of the Conveyancing Act of 1924. Section 4

of the Land Registers Act was repealed by the Statute Law Revision Act of 1875.

As stated, section 4 of the Land Registers Act was incorporated in section 141 of the Consol. Act. The latter section, however, contained some notable additions. To begin with, it re-enacted that part of section 25 of the Titles Act of 1860, relating to the form of warrant which was to be used in connection with the Clause of Direction. The form scheduled to the 1860 Act was, however, if anything, more comprehensive. It was adapted to the case of a deed being registered along with a relative assignation or other deed, whereas the Consol. Act evidently overlooked this contingency. On the other hand, the Land Registers Act made no reference at all to the Clause of Direction or the warrant appropriate thereto, but section 7 of that Act, which read that "registration of writs in the General Register of Sasines shall, except in so far as altered by this Act, continue to be made in conformity with the practice heretofore in use", had to be kept in mind. Again, we find a proviso at the end of section 141 that "where registration has been made or shall be made in any particular register of sasines it shall be sufficient that such register is specified in the warrant of registration without any specification of

"county or counties". This proviso was an amendment made by the Titles to Land Consolidation Amendment Act of 1869, to be read and construed as if it had originally been in the section, and one which was due to be made, seeing some of the Particular Registers lingered on for as much as three years after the passing of the Land Registers Act.

Both section 4 of the Registers Act and section 141 of the Consol. Act expressly authorised signing of the warrant, either by an individual agent or by a firm. This was a definite pronouncement, and removed the doubt which had existed as to the competency of a firm of law-agents signing the warrant under the previous Acts. The elucidation of this point had never been sought from the Court, and agents frequently were wont to re-record their writs, rather than take the risk of having titles pronounced invalid whose warrants had been signed by a firm.

There were three other enactments in the Consol. Act concerning the mandate for registration. There was, first, section 145, which was a clause of indemnity for errors in past warrants of registration. This enactment was made in order to allay the anxieties of agents, who had discovered trifling defects in warrants of registration endorsed on deeds which had already been recorded. It declared that it

shall not be competent to challenge the validity of existing warrants of registration upon conveyances under the Titles Acts of 1858 and 1860 on the ground of disconformity to the Schedules to those Acts, provided the warrant contained the name of the party on whose behalf it was written, and his designation, or a reference to his designation, as given in the deed, and that it was signed by the party, or by his agent or agents, either individually or as a partnership, and the designation "agent" or "agents", without any further designation, should be valid and sufficient in the case of all warrants expedite in virtue of these repealed Acts. This section was intended to relax, in some degree, the standards laid down by the Court in the case of *Johnston v Pettigrew*,⁽¹⁾ where it was decided that a writ was ineptly recorded in respect of the following omissions from the warrant of registration: first, the failure to design the party seeking infestment, and, second, failure on the part of the agent to add to his signature his professional designation and the name of his client.

The case of *Johnston v Pettigrew* has been the only occasion on which the invention of the Act of 1858 has been brought before the Court, and looking back on the circumstances under which the errors were

(1) *Johnston v Pettigrew*, 16 June, 1865, 3 M.954.

committed on that occasion, one cannot help feeling, even at this time of day, some sympathy for the defender. Referring once more to section 1 of the 1858 Act under which the cause proceeded, we find that that section spoke of the deed being presented for registration with a warrant of registration in the form of Schedule (A) No.1, specifying the person on whose behalf it is presented and signed by him or his agent. The Schedule alone embodied those particulars which were lacking in Pettigrew's warrant. It seems the Agent who framed the warrant thought he was justified in paying more heed to the section than to the Schedule on the erroneous view that the forms in schedules are not so imperative as the sections by which they are governed. This case, of course, was decided upon two Acts of Parliament which have since been repealed; nevertheless the observations which fell from the Bench touching on the substance of the warrant of registration still retain their value as a permanent guide for all whose work it is to be engaged on the business of registration. On the more general question as to what attention should be paid to a remedial conveyancing enactment, the then Lord Justice Clerk remarked, "It appears to me to be an "established rule of construction that where a party "desires to avail himself of a new, simple, and

"inexpensive mode of completing his title, he must do
 "it in the mode prescribed, or else he cannot take
 "the benefit of the provision. I do not say that a
 "mere literal deviation from the Act, a mere unim-
 "portant substitution of one word for another would
 "destroy the validity of the procedure; but a party
 "seeking to avail himself of this enactment must, not
 "in the very words, nor even in the very form, but in
 "substance do everything required both by the statute
 "and the relative schedules." Touching more direct-
 ly on the warrant itself, Lord Cowan stated, "No
 "doubt whatever, so far as name and designation can
 "do so, ought to be allowed to exist on the face of
 "the warrant as to the identity of the individual,
 "who, by means of the registration becomes feudally
 "vested in lands whether in property or in security".

The other two enactments were sections 22 and
 23, with Schedules (M) and (N), respectively. Sec-
 tion 22 repeated the provisions of the Titles to Land
 Acts of 1858 and 1860 with regard to assignments of
 unrecorded conveyances, but unlike those Acts, the
 Consol. Act did not leave the form of these writs to
 be regulated entirely by the Schedule. The Schedule
 relative to section 22 of the Consol. Act, however,
 is of chief interest to us. By a note placed im-
 mediately below Schedule (M) No.1, there was provided

a form of docquet to be written on an assignation when recorded along with the deed assigned. As already stated, the Acts of 1858 and 1860 envisaged the use of such a docquet, but as no form was given the necessity for using it was frequently lost sight of. Mr Marshall,⁽¹⁾ e.g., was of the opinion that a docquet was not an essential of the Acts of 1858 and 1860. However, "in order to remove all doubts which had been entertained in some quarters as to this," a declaration was inserted at the end of the section under discussion that assignations were effectually recorded, although not docketed with reference to their warrants. Unfortunately, on account of faulty wording, the declaration was made to apply solely to assignations written upon the conveyance, which, of course, do not require a docquet.

Section 23 replaced the provisions of the Titles Acts of 1858⁽²⁾ and 1860⁽³⁾ relating to the form and mode of expediting Notarial Instruments in favour of parties acquiring right to unrecorded conveyances. In this case the relative Schedule⁽⁴⁾ likewise contained a form of docquet to be endorsed on the Notarial Instrument when recorded, but the section

(1) Analysis of Consolidation Act, p.56.

(2) S.14.

(3) S.10.

(4) Note to Schedule N.

contained no clause of indemnity, the reason being that the former Acts did not contain any suggestion as to the need of a docquet.

No change was made by the Conveyancing Act of 1874 with respect to this matter. The Conveyancing Act of 1924 (sec.10) has the last word on this subject. It repealed the forms of warrant provided by the Consol. Act and the Land Registers Act of 1868, and substituted a new form of warrant (Schedule F). Appended to this Schedule are comprehensive notes, specifying in what manner the warrant is to be modified when it is to be adapted to purposes varying from the norm. Briefly, it may be said, the purpose of the latter Act, so far as the mandate for registration is concerned, is to reduce the warrant to the smallest possible compass, thereby reducing the chances of error. Thus, where a party is already named and designed in a deed, the name alone of the party, coupled with the reference words "within named", will fully answer the former requirement of name and designation of the party in the warrant, and full designation only requires to be given where, as happens e.g. in a discharge of a bond, the designation cannot be found in the deed (sec.10 (1)). Further, in order to bring past warrants into line with the new warrants, sec.10 (2) debars any challenge of any

warrant of registration on any writ recorded before the commencement of the Act on the ground that the person in whose favour such warrant is conceived is not designed therein, or that the nature of his right is not stated therein, if such warrant on being read as forming part of such writ identifies such person as a person therein named and designed. Another enactment provides, with retrospective effect, that all the qualities of a destination as set forth in a deed are presumed to be imported into a warrant without being recounted therein (sec.10 (3)). A notable change has been made by this Act with reference to the endorsation of the docquet in the case of a principal deed being recorded with a separate assignation or notice of title. Under the Consol. Act the Assignation or Notarial Instrument required to be docketed with reference to the warrant of registration on the principal deed; but this order has now been reversed.⁽¹⁾ Finally, it is to be noted that it is now no longer competent to give investiture ex propriis manibus (sec.10 (6)).

This was the only modern survival of the proper investiture, and it took the form of an infeftment given by a husband to his wife, commonly in liferent

(1) Vide Notes 7, 2 and 5 to Schedules B, C and F respectively.

after his death. Prior to 1845, such infeftment was usually joined to the husband's, and the Instrument of Sasine contained a statement that the husband did ex pro manu^{thus} give liferent sasine by delivery of the appropriate symbols. Where there was no antecedent warrant, the husband as well as the notary required to sign the Instrument. The husband's signature, unattached, operated as a disposition in favour of the wife. Section 15 of the Consol. Act adapted the altered procedure in the manner of taking infeftment, to infeftments ex pro manu^{thus}, and, on the analogy with the former procedure, provided that where a husband wished to give sasine ex pro manu^{thus} to his wife, he might do so by interpolating words to that effect in the warrant of registration, which he had to sign with his own hand.⁽¹⁾ This method was latterly little used in practice; hence its abolition by the later Act.

In the previous chapter we discussed the rule of law that a precept of sasine was not exhausted until the mandate of the granter was completely carried out, and how from this rule it followed that a fresh Instrument of Sasine might be executed and recorded where, from some reason or other, the precept remained unexhausted. These rules won formal recognition

(1) Sch. (H) No.3.

in the Conveyancing Acts. Thus, section 4 of the Infertment Act of 1845 declared that in case of any error or defect in an Instrument of Sasine, or in the recording thereof, it should be competent of new to make and record an Instrument of Sasine, which would have effect from the date of recording thereof, as if no previous Instrument had been expedite and recorded. Section 31 of the Titles Act of 1858 extended the scope of this enactment to other instruments, but as the principle of direct recording of conveyances was then introduced it became necessary to adapt this enactment to the substitute of the Instrument of Sasine, i.e., the warrant of registration; accordingly the said section of the 1858 Act further declared that it should be competent of new to record a conveyance with the original or a new warrant of registration. In passing, it may be remarked that the said section erroneously referred to Notarial Instruments expedite under the Infertment Act of 1845, instead of the Heritable Securities Act of 1845. This error, however, was rectified in the Titles Act of 1860.⁽¹⁾

The final formulation of this rule is to be found in section 143 of the Consol. Act, which is a consolidation of the provisions of the Titles Acts of 1858 and 1860 on the same subject.

(1) Sects. 18 and 35.

Section IV. LAND REGISTERS ACT OF 1868.

Because registration under the Conveyancing Acts became synonymous with infeftment, and the completion of title and the form of deeds were linked in partnership with registration, there was a clear call on those Acts to explain when, how, and for which purposes a deed should make contact with the register. Other matters, such as the co-ordination of the various registers and the overhauling of the machinery of registration, were not within their purview, and, therefore, were not dealt with by those Acts, but were left to be handled by a separate Registration Act, namely, the Land Registers Act of 1868.

Right from the commencement of the Registers Act of 1617 down to the year 1868 registration of sasines had been almost entirely conducted on a dual basis. We say almost, because of the practice carried on for many years prior to 1868 of registering writs relating to lands in the Lothians in the Particular Register⁽¹⁾ only. The over-lapping due to this dual system was responsible for a great deal of unnecessary expense in searching. Before the passing of the Registers Act of 1868, on making a search it was necessary to search in the Register House the Minute

(1) Report of Select Committee on Writs Registration (Scotland) Bill, 1866, p.13.

Books of both the General Register and the Particular Register, as well as the Minute Books of the Particular Register for the period during which they were kept in the locality. Other drawbacks resulting from this arrangement were risk of multiplication of errors, lack of uniformity in the preparation of the Minute Books, and the retarding of the framing of the Abstracts, which were essential for rapid searching.

The chief arguments for the retention of this dual system had lost their force with the improved means of communication by land and the facilities derived from an efficient postal system. Moreover, the accommodation at one time offered by the dual system ceased to be of any value now that symbolical delivery was abolished and the regulation limiting the period of registration to 60 days was removed from the Statute Book. Another point to be remembered is that since the inauguration of the Minute Book no further improvements had been made in the technique of registration, and although Keepers of the Registers had, as we have learnt, frequently been censured for not attending to the requisites of the Minute Book, yet it became obvious to every fair-minded person that some consideration deserved to be given to the plea of the Keepers that it was asking the impossible to expect them to prepare a Minute of a deed and have it

signed by the presenter and the keeper all on the spot, as the regulations required.

These considerations, among others, encouraged an agitation for altering the organisation of the registers and a demand that greater facilities should be offered to the public on a scale commensurate with the changes and economies effected through the reforms of the Conveyancing Acts.

This agitation bore fruit in the passing of the Land Registers Act of 1868.

Apparently the suggestion for the abolition of the local registers was first mooted by some pamphlets published by a Mr Crosse, Sheriff-Substitute of Perthshire.⁽¹⁾ Mr Crosse's suggestion was sponsored by several members of the Society of Procurators of Glasgow, arising out of which a Committee appointed by that Society reported in its favour. The Society afterwards went back on its recommendation, but at this stage they sent copies of their Report to the Deputy Clerk Register (Mr Dundas) and the Dean of the Faculty of Advocates (Mr Inglis). As a result of the collaboration of these two gentlemen, a Committee of the Faculty of Advocates was appointed in 1857, who also gave their approval, which in turn was endorsed by the W.S. and S.S.C. Societies. On this

(1) Ibid., p.6.

later Report a Bill was drafted by Mr Inglis, but it got no further. Various other Bills were drafted, none of which was submitted to Parliament, and the whole agitation then hung fire until the next step, the appointment, in 1861, of Messrs Morton and Bannatyne as Commissioners to enquire and report on the whole subject of the registers. These Commissioners issued a Report, vindicating Mr Crosse's proposals. They recommended, among other economies and amalgamations, that the Particular Registers and the General Register of Sasines be united so as to form one register, kept in county arrangement, with relative Minute Books and Presentment Books, which register was also to assimilate the Register of Interruptions of Prescriptions. The latter register was established by an Act in 1693 (c.19), ordaining that Interruptions should be of no effect against singular successors and purchasers unless the summonses and executions, in the case of Interruptions made via juris, and an Instrument of Interruption, in the case of one made via facti, were registered within 60 days of their dates in a Particular Register directed by the Act to be kept for that purpose by the Lord Clerk Register in Edinburgh. This register, however, was little used. Between the years 1837 and 1842, on an average as little as one writ per annum was recorded in it.

Following on the Commissioners' Report, interest in the subject of their Report was maintained by 3 Bills, the first and second of which were introduced by the then Lord Advocate in the years 1864 and 1865 respectively, and the third, a private Bill, drafted by Mr Dunlop, M.P. for Greenock, in the latter year.

The Lord Advocate's Bills, in the main, embodied the conclusions arrived at by the Commissioners. Mr Dunlop, on the other hand, founded his scheme on the principle of devolutionary amalgamation of the real and personal registers.⁽¹⁾ Summarised, his proposals were: (1) discontinuance of the General Register of Sasines and of Inhibitions and the Register of Adjudications, all then kept at Edinburgh; (2) discontinuance of existing Particular Registers of Inhibitions; (3) continuance, under a new designation of "Register of Land Rights", of the existing Particular Registers, with a provision that all Interruptions, Inhibitions, and Adjudications affecting land within the district should be recorded within the Register of Land Writs for the district; and (4) the establishment of a similar Register of Land Writs for each county then only forming part of a registration district. As these proposals were not adopted by the legislature,

(1) See Article on the Rival Land Registers Bills, *Journal of Juris.*, ix. 1865, pp.101, 142 et seq., and 257.

there may not seem to be much point in making any comment on them, but we may remark that while they were a corrective to the system as it was then constituted, e.g., the provision for a register for each county, any advantages they might have held in store for us were more than offset by their disadvantages. They did not entirely remove the objection of double searching, and they lacked those benefits derived from centralisation which are now apparent to everybody. They were rejected because the most influential section of the legal public, including the law officers of the Crown, was converted to the idea of centralisation. A decided lack of confidence in the administration of the local registers seems also to have been a factor in deciding the fate of the provincial registers. One writer on conveyancing went so far as to say, "the registers of the county are very often inaccurately kept, and it is safer, therefore, to register in the General Register of Sasines".⁽¹⁾ Beyond cavil, however, county practitioners and also a majority of the Glasgow Procurators preferred Mr Dunlop's Bill.

The opposition to centralisation, to which we have referred, not being negligible, the Government

(1) Russel's Theory of Conveyancing, 1788, p.200.

committed the whole matter to a Select Committee of the House of Commons in 1866. This Committee did its work very thoroughly, and every possible objection to centralisation came under its review. As may be read from the evidence, much play was made by opponents of centralisation with the fact that the number of writs recorded in the Particular Registers exceeded the number recorded in the General Register by a considerable margin. The number of writs recorded in the Particular Registers, excluding the three Lothians, which were under the management of the Keeper of the General Register of Sasines, for the three years 1858, 1859 and 1860 averaged 8739, whereas the number recorded in the General Register of Sasines, including the three Lothians, for the year 1860 totalled 5756. These figures seemed to argue for the popularity of the local registers, but the blunt statement made by Messrs Morton and Bannatyne in their Report (p.23) that "an allowance or discount" was given in some districts by the Keepers to agents "who recorded their writs in their registers, in preference to the General Register", indicated that this popularity had rested on a very imperfect basis.

With the handing in of the Report to the House on 22nd July, 1866, the stage was set for the passing of the Land Registers Act of 1868.

Independently of the Conveyancing Acts, this Act inaugurated many changes and innovations in our system of registration, and provided several facilities which had frequently been mooted by the legal societies and also recommended by Messrs Morton and Bannatyne. The main change, of course, was the discontinuance of the local land registers and the Register of Interruptions and the establishment of a comprehensive General Register of Sasines, kept under one roof and under one management.

The Act took effect from and after 31st December, 1868, but in order to allow time for the new organisation to function smoothly, the local registers were not abolished all at once, but from varying dates, closing on 31st December, 1871 (sec.8). The first batch of registers was closed on 6th February, 1869, the last register to be closed being that of Kinross-shire on 31st December, 1871. The new General Register was to be kept so that the writs applicable to each county in Scotland were to be entered in a separate series of Presentment Books, Minute Books and Register Volumes,⁽¹⁾ but for the purposes of the Act the barony and regality of Glasgow and the stewartry of Kirkcudbright were to be treated as separate counties.⁽²⁾

(1) S.3.

(2) Ibid.

This arrangement was altered in some respects, owing to the provisions of subsequent Acts of Parliament. The Local Government (Scotland) Act, 1889, which changed the boundaries of the counties, enacted that the separate counties of Ross and Cromarty were to be united for all purposes under the title of the County of Ross and Cromarty.⁽¹⁾ Another Act passed in 1891 (54 Vict.c.9) provided that the orders of the Boundary Commissioners under the before mentioned Act should, with respect to registration of writs, not come into operation before 15th May, 1892; and it also provided that it should not be necessary to keep separate divisions of the register for the Counties of Orkney and Shetland,⁽²⁾ though in point of fact, only one division for both these counties had hitherto been kept. Registration in the county of the Barony and Regality was very confused for some little time after the Land Registers Act was passed. The boundaries of the county were not known with any great degree of precision. In order to remove all doubts as to these, an Act was passed in 1871 (34 and 35 Vict., c.68) declaring that the barony and regality shall include the Parishes of Glasgow Barony, Maryhill, Shettleston, Springburn, Calton, Govan, Gorbals and

(1) S.39 (1).

(2) S.1 (2).

Cadder, but not the Parish of Old Monkland. Section II. of the 1871 Act also removed any objection which might be taken to any writ dealing with lands in any of the above parishes which had been registered prior to the Act in any of the divisions of the General Register of Sasines applicable to the counties of the barony and regality of Glasgow, Renfrew and Lanark in respect that it ought to have been registered in another or more of said divisions. Similarly Section III. of this Act removed any objection to a writ dealing with lands in the parish of Old Monkland on the ground of its having been registered in the Particular Register for Lanark when the proper register was the barony and regality of Glasgow, and vice versa.

It will be observed that the Act gave recognition to the Presentment Book. As may well be imagined, pressure of work was greater in the Sasine Office at Edinburgh than in the other registers, and the staff at Edinburgh ultimately had to give up the impossible task of trying to keep up with the regulations regarding the framing of the Minute Book. In order, therefore, to save time and yet keep to the spirit of these regulations, a former Keeper of the Old General Register of Sasines hit upon the expedient of getting the presenter of the writ to make a signed

entry in a Book then called the "Table",⁽¹⁾ stating the date and hour of presentation and the name of the party to the writ. This Table, or Presentment Book as it was called later, was utilised as a guide to the order of the Minutes. Some of the Keepers of the Particular Registers followed suit. In other districts, where no such Book was kept, the order of ingiving was made to depend principally on a running number written in pencil on the back of the writ.⁽²⁾

No suggestions or regulations regarding the manner of keeping the Presentment Book were made by the Act and this Book has always been regarded as an adjunct to the process of registration and no more. Its prestige has not been permitted to grow at the expense of the Minute Book, because of the enactment contained in section 7, which declares "no error or omission in any Presentment Book shall invalidate or in any way affect injuriously the registration of any writ".

As the district registers were now abolished and as country agents could not be expected to call personally at the General Register to present their writs, or employ an agent to do so on their behalf,

(1) Memo by G. B. Robertson. See Appendix No. IV. to 1st Report by Registration and Conveyancing Commissioners (England), 1850.

(2) Morton and Bannatyne's Report, p.9.

some formal provision had to be made for transmitting writs by post. The custom of sending writs by post had a considerable vogue even prior to the passing of the Act, and for the convenience of the public Keepers of the Registers had been wont to appoint a clerk to act as presenter, but, of course, there was no statutory authority for this procedure. When the question was put to the Keeper of the Old General Register of Sasines, on his appearance before the Select Committee of 1866, as to which of two writs arriving by the same post he would put first on the register, he replied that he never had occasion to deal with this contingency, but if it had occurred, he would have made a special entry in the Book. All these points are now carefully regulated by section 6 of the Act. Under this enactment statutory provision is made for transmission of writs by post and for the appointment of a clerk in the Register House as ingiver of such writs, and the problem of preference is solved by the declaration that writs arriving by the same post shall be deemed and taken to be presented and registered contemporaneously. The exception in the clause of warrandice or the knowledge of a prior security would not prevent a party from obtaining pari passu ranking with another deed sent by the same post (Leslie v McIndoe's Trustees, 1824, 3 Sh.48).

In spite of the enactment, however, the statutory ranking of post writs may be altered by a conventional arrangement.

Having settled the question of centralisation of the registers, the Act then proceeds to offer to the public those facilities which were the inducements for supporting the proposals of Messrs Morton and Bannatyne. In the first place, it was now made possible to record a writ embracing lands in several counties, through one act of registration. A writ of this kind is engrossed at length in the register book of one county only, and a memorandum of reference to the full engrossment is made in the volumes pertaining to the other counties. The public is safeguarded by the provision that the deed must, nevertheless, be entered in the Presentment Books and Minute Books appropriate to all the lands mentioned in it.⁽¹⁾ A party is not prejudiced by an omission to refer to one or more counties in the warrant of registration on an original registration. Should this event happen, the deed may be re-registered with a fresh warrant, referring to the omitted county or counties, whereupon registration will be effected for the omitted lands, following the procedure by memorandum outlined above.⁽²⁾ The Act also authorised

(1) S.3.

(2) S.5.

the recording for preservation, or for preservation and execution, of any deed which may be competently recorded in the register of sasines, provided a warrant of registration is endorsed thereon in terms of Schedule (A) No.3;⁽¹⁾ but to obtain the benefit of registration for preservation and execution, the deed must contain a procuratory for registration or clause of consent to registration for the purpose of execution.

When registered for execution, an extract containing (as part of said extract) a warrant of execution was appointed to be delivered by the Keeper of the Register of Sasines in terms of Schedule (B). This facility was first mooted in the year 1858, and was actually incorporated in the Titles to Land Bill of 1860, but owing to the opposition of the Keepers of the Particular Registers, the clause dealing with it was deleted in the House of Lords.⁽²⁾

Several alterations have subsequently been made on section 12 of the Land Registers Act of 1868. If a deed which is eligible for recording in the register of sasines with a warrant of registration for preservation and execution has been recorded for preservation only, one may now record the extract anew

(1) S.12. S.138 of Consol. Act.

(2) Report of Select Committee of 1866, pp.26-27.

for preservation and execution; in which case it will not be necessary to engross the extract ad longum in the register.⁽¹⁾ Another alteration was made by the Conveyancing Act of 1924 (sec.10 (5)). This consists of the substitution of the short form of warrant of execution given by the Schedule to the Writs Execution Act of 1877 for the lengthy one which had hitherto been appended to extracts of deeds for execution issued by the Sasines Department. Finally the relative warrant of registration provided by the Land Registers Act was superseded by the form provided by the Conveyancing Act of 1924 (sec.10).

Section V. LATEST CHANGES AND IMPROVEMENTS IN THE PROCESS OF REGISTRATION.

(1) The Search Sheet.

Under Treasury sanction a document called the Search Sheet has been in preparation in the Sasines Department since the year 1871, which the officials of that department utilise for the issue of their searches. This document has had a curious and eventful history. It has been variously described

(1) Writs Execution (Scotland) Act, 1877, S.6.

and defined. Its ideal is to exhibit and furnish a ready made search by anticipation over every unit of property in Scotland. For all practical purposes this aim has been achieved, and the achievement was brought about by more or less setting a folio apart in the Search Sheet volume for every unit of property, then selecting from the Minute Book all entries dealing with a particular property and posting the same in chronological order to the folio already prepared to receive them. It is thus a system of "ledgerising the register under each property or registration unit". As it stands to-day, this document forms, so to speak, a half-way house to the system of registration of title, and as such is one which is not usually counted as forming part of a system of registration of deeds. However, it is, or was to be found elsewhere. Save where superseded by registration of title, something comparable to our search sheet forms an integral part of the system of registration of deeds in South Africa;⁽¹⁾ and until the introduction of registration of title for the whole of Switzerland in 1912, some of the Swiss Cantons had a system of registration "where deeds were arranged under headings "relating to the property to which they related".⁽²⁾

(1) Vide E. J. Taylor: Registration of Deeds under Roman Dutch Law, L.Q.R. 1886, p.347.

(2) Sir C. F. Brickdale: Methods of Land Transfer, pp.144-5.

In common with so many other improvements in our system of registration, the Search Sheet owes its birth to the fertile labours of Messrs Morton and Bannatyne. As avowed by themselves, they were not the originators of this document, but they deserve special credit for being quick enough to see what possibilities lay underneath a rudimentary proposal which was brought to their notice by a member of the legal profession. This gentleman's suggestion did not go beyond providing an Incumbrance Sheet to be attached to every deed forming a title of investiture, just as in his own words "a ship's register exhibits, "by an endorsement, any incumbrance affecting that "ship, or a policy of life assurance those created "over it". Under his scheme, the duty of noting the constitution or discharge of a bond affecting a property was to rest with the Keeper of the Register. The basic principle of his project was that every title to land should shew what incumbrances affected it. As will be observed, the exhibition of the state of investiture did not come within the scope of this scheme.

Morton and Bannatyne at first sought to improve on this suggestion by a proposal that a Search Sheet should be substituted for the Incumbrance Sheet, to be kept apart from the deeds forming the progress of

titles, in which every deed, whether creating a redeemable or irredeemable right or burden would be noted by the Keeper at the time of registration. To provide against the loss of the principal sheet, a duplicate was to be kept by the Keeper which would be written up simultaneously with the principal sheet, when the latter was presented to him on the occasion of a registration. However, practical difficulties in the working of this amended scheme compelled them to modify it still further, and eventually they formulated a detailed working plan for a Search Sheet, but minus Indexes, which turned out to be practically on all fours with the one we find in operation to-day in the Sasines Department. It is necessary to add that the Commissioners also advocated the issuing of an authenticated duplicate of the Search Sheet to form part of and to pass from hand to hand with the progress of titles. The latter proposal together with other minor suggestions by them, savouring of over-solicitude for the success of the main proposal, have not been adopted in practice.⁽¹⁾

Morton and Bannatyne were at first inclined to press for the simultaneous introduction of the Search Sheet with the abolition of the local registers, but

(1) Report, pp.28-31.

later, in deference to the opinion of officials of the Register House, they agreed that it was expedient to postpone the inauguration of the Search Sheet until the transfer of the District Registers had been carried through.

Without entering into any other reasons to account for the exclusion of the Search Sheet from the provisions of the Land Registers Act, the non possumus attitude of the officials of the Register House was alone sufficient cause to deter our legislators from sanctioning the introduction of the document at a time when so many important changes in the system of registration were in contemplation.

Although, for the reason already stated, these officials were at the time referred to reluctant to participate in the inauguration of the Search Sheet, this did not mean that they had relinquished their interest in it; on the contrary, they were very much in its favour, and it was introduced on a partial and experimental scale, but without statutory authority, by Mr David Yule in the year 1871 for the counties of Glasgow and Renfrew. Three years later, i.e. in 1874, the document was extended to cover the counties of Argyll, Bute, Clackmannan, Dumbarton, Fife, Kinross, Perth and Stirling, and in 1876 to the remaining counties.

The fact that Statute never lent its authority to the introduction of the Search Sheet, nor made any pronouncement in favour of its continuance, was an important factor in influencing some people's minds against this document. Resistance to the Search Sheet perturbed the officials of the Register House at its commencement, and we venture to think they must have been gratified to learn that Lords Curriehill and Gifford, under a remit to them from the Court of Session, expressed themselves in favour of the desirability of trying out the Search Sheet as an experiment.⁽¹⁾ Notwithstanding this heartening pronouncement, the document would probably have been strangled at birth had it not been for the action of the Treasury, who by Minute, dated 21st December, 1875, authorised the Keeper of the Register of Sasines to issue searches made from the Search Sheet to any members of the legal profession who might ask for them. Very few searches were ordered under this ordinance, so in order to prevent the scheme from dying of inanition, the Treasury issued another Minute, dated 6th December, 1877, directing that the Deputy Keeper of the Records should transmit to the Keeper of the Register of Sasines all searches ordered

(1) Vide Report by Lord Low's Committee, paras. 80 to 83.

through him, in order that searches might be made from the Search Sheet to the extent for which it was available. This Minute further provided that, for the future every search was to be made by means of the Search Sheet so far as existing, unless specially ordered by the applicant to be made by means of the Abridgments.

If one were to ask why the Treasury took the unusual step of conferring quasi authority on the experiment of the Search Sheet, one would be referred to the undue delay which took place at that time in issuing searches from the Register House. How and why this state of affairs had arisen ought to be mentioned.

As previously stated, when writs were fewer in number the public made its own arrangements for searching; and law agents were wont to conduct their own searches. But as writs increased in number, searching naturally became more complicated, and therefore required for its proper and efficient performance a special training in that art. Agents, accordingly, gave up the task and handed it over to people who were more suited for it.

Prior to 1853 there were no officers whose duty it was to make and certify searches; but owing to their special position and knowledge the practice had

prevailed for a very long time of employing the Deputy Keepers of the Records to make searches, which bore a semi-official character. This privilege, which formed no part of their official duties, was specially reserved to Messrs William and George Robertson on their appointment as Joint Keepers on 31st December, 1829, which they held until the year 1853. Needless to say, this privilege was not extended to their successors.

To put themselves in a position to issue searches with despatch and accuracy, the Keepers of the Record had for a long time, on their own initiative and at their own expense, developed a practice of framing Indexes for their own use. These indexes were two-fold in character: indexes of locality and indexes of persons, combined with an arrangement under the head of parishes.⁽¹⁾

On the death of George and the retirement of William Robertson, a new arrangement, perforce, had to be made, and the Treasury by Minute, dated 27th September, 1853, appointed four officers to carry out searches, for whose accuracy, however, it was understood the Treasury disclaimed all responsibility. As the registers were then, as now, open to the public

(1) Memo by G. B. Robertson printed with the Report of the English Regn. Commissioners, 1850.

the right of the public to search the register by themselves or through their agents was left unimpaired. The private indexes referred to were not continued and those in existence were not acquired for the State. It has been stated that these indexes were only intelligible to their framers, so that, in any event, their acquisition would have been of doubtful advantage.⁽¹⁾

From what has been stated it has been shown that over a lengthy period the Treasury had made themselves peculiarly responsible for the issue of searches; consequently they felt that a special duty devolved upon them to do something towards removing the complaint, prevalent since the appointment of the official searchers, that the official searching department was in a chaotic condition, and that delay in searching was chronic.

It has been worth while mentioning these matters, because it has often been overlooked that the intervention of the Treasury was undertaken in the public interest. It must also be emphasised that their action was taken in response to requests from prominent legal bodies that the Search Sheet be extended in order to overcome an evil which was causing great inconvenience to the public and which had brought the

(1) G. B. Robertson: Manuscript communication to the Faculty of Advocates, p.4.

whole institution of official searching into disrepute. Round about the year 1875, matters in this respect had reached their climax, and a remedy was anxiously debated in legal circles. In particular, we find the Society of Writers to the Signet petitioning the Treasury to make some arrangement for bringing up the arrears of searches and for the completion, with all possible despatch, of Search Sheets for a period of 20 years for the whole Sasine Registers. Similar petitions were forwarded by other legal bodies. The answer to these petitions was the Treasury Minute of 1875.

Following on the Report of a Departmental Committee set up by the Treasury in 1880, the Treasury issued another Minute on 27th March, 1881, in which inter alia it was announced that the duties of the existing official searchers were transferred from the Record Office to the Register of Sasines. The posts held by these Officers were allowed to lapse. In 1890 only one officer remained, and the duties performed by them were undertaken by officials in the Register of Sasines by means of the Search Sheet. By another Treasury Minute in 1905, the Treasury has undertaken to guarantee the accuracy of all searches issued by means of the Search Sheet, subject to any claim which may arise being lodged within 6 years of

issue of search. This step was advocated by Lord Low's Committee (par. 176).

On perusing the numerous Reports which have been issued from time to time by the various legal societies, we find that, apart from occasional dissident voices, there has been general approval for the official system of searching by the Search Sheet. But interspersed with this approval one note is often heard, which is to the effect that the preparation of the Minute Book with its relative Indexes has become a work of superfluous labour since the inauguration of the Search Sheet.

A Departmental Committee, presided over by Lord Lee, who held an enquiry in 1888 and 1889, focussed their attention on this plea. They expressed the belief that in course of time "the present necessity for preparing and printing the Minute Book and Abridgments will not exist".

Judging from the various efforts to legalise the Search Sheet which followed this expression of opinion, it was evident that this point of view commanded a very large measure of support from the legal public, though it evoked the inevitable rejoinder that the Search Sheet itself should be discontinued. In a Report by a Joint Committee of the Society of Writers to the Signet and the Faculty of Procurators

of Glasgow in April, 1890, on the "Preparation and Use of the Search Sheet", two important suggestions appeared: (1) legalisation of the Search Sheet, and (2) discontinuance of the Index of Places to the Abridgments. In a supplementary Report in November, 1892, by the four chief legal societies, the following suggestions were added, (1) discontinuance of the Abridgments, (2) duplication of the Search Sheet, and (3) the introduction of a printed Record, in which each writ should have a reference to its appropriate folio in the Search Sheet. Arising out of these Reports a Committee representing the four Societies met *the Secretary of State for Scotland and* ~~Sir George Trevelyan~~, the Lord Advocate, on 16th December, 1892, the outcome of that meeting being that a Bill, called the Land Registers (Scotland) Bill, was presented by him and the Solicitor General to the House of Commons in August of 1893. Among its terms were the following provisions: (1) entry in the Presentment Book to regulate date of registration, (2) discontinuance of the Abridgments, and (3) legalisation of the Search Sheet. This Bill was withdrawn before second reading. It is interesting to know that Dr Murray,⁽¹⁾ who subsequently recanted many of

(1) Reprint from the Proceedings of the Incorporated Society of Law Agents in Scotland, 6 Oct., 1893.

his views on the subject of the reform of our system of conveyancing, demurred to the Bill because it did not provide for the abolition of the Burgh Registers, and also on the ground that the Search Sheet was to remain in the Sasines Department, without being subject to the control of the Deputy Keepers of the Record. The latter objection was not new. It owed its derivation to the principle that the maker of a Record and its custodian ought not to be one and the same person. As the Registers are now under the general superintendence of one Head, this objection can no longer be maintained.

Whatever may have been the real reason for the withdrawal of this Bill, it was apparent that there were some second thoughts on the proposed changes, which may be traced in part to the feeling that the discontinuance of the Abridgments, at a time when the Search Sheet had not yet attained complete perfection, was a rather risky speculation. This thought seems to have lain at the back of the minds of the drafters of another Bill in 1895, which was content to discontinue the Index of Places to the Abridgments only, whilst advocating the legalisation of the Search Sheet.

Generally speaking, the two sets of proposals outlined in those two Bills, those advocating the

abolition of the Search Sheet being a small minority, were the axes round which revolved all discussions at that time regarding changes in the technique of registration.

The next step was the setting up of a Committee by the Secretary of State for Scotland on 31st January, 1896, under the chairmanship of Lord Low, who reported in favour of the continuance of the Search Sheet on its footing as an office document, and that every facility for its improvement, such as the commencement of a new series, should be sanctioned.

On the question of the Abridgments, the Committee was emphatically in favour of retention; but they recommended the shedding of the Index of Places on the ground that the expense involved in its compilation was disproportionate to the aid it afforded in searching.

Lacking the authoritative support of Lord Low's Committee, the question of the legalisation of the Search Sheet was relegated to the background, and attention was for a time devoted to procuring legislative sanction for other findings of the Committee, notably the discontinuance of the Burgh Registers and the compilation of the record by a mechanical process. To this end Bills were drafted in the years 1899, 1900, 1901 and 1903. The Bill of 1903,

substantially the same as the one of 1901, was submitted by Mr Hope Finlay. It was introduced into the House of Lords by Lord Balfour of Burleigh, Secretary of State for Scotland, and ordered to be printed. Nothing came of these Bills.

Since the investigation by Lord Low's Committee, the Search Sheet has come under the review of two other important bodies, one the Royal Commission appointed on 23rd May, 1906, under the presidency of Lord Dunedin, who issued their report on 25th July, 1910; and the other, the Committee appointed by Sir John Gilmour, Secretary of State for Scotland, on 12th March, 1927, under the chairmanship of Lord Fleming, who issued a Report which was made public on 23rd June, 1928.

Under their remit, the Royal Commission of 1906 were confined to making an enquiry into "the expediency of instituting in Scotland a system of registration of title". Although they could not consider any specific proposals for the reform of our present system of registration, the subject of the Search Sheet could not be shut out of their deliberations. When considering what facilities we possessed in Scotland for introducing registration of title, the Chairman and his two colleagues who concurred with him in a separate Report, counted the Search

Sheet as one of them. They stated, "It is an office document which has now reached what may be termed practical completion, and which would tend to simplify the obvious difficulties of first registration of old existing properties."⁽¹⁾ In the opinion of those same Commissioners, among the difficulties which stood in the way of substituting registration of title for the present system and which the Search Sheet could do little to remove, were the existence of superiorities, unworked minerals and restrictive covenants and servitudes.⁽²⁾

During the progress of this inquiry, leave was obtained from the Treasury to institute an experimental register for the county of Fife.⁽³⁾ Arising out of this experiment, a proposal was laid before the Commissioners that the Register House should issue certificates, shewing the present state of title as regards ownership and burdens, so far as this could be done from the records for the previous 20 years, and using the Search Sheet for this purpose. The State was to guarantee the validity of the progress of titles and the correctness of the certificate. The comments on this proposal made by the

(1) Chairman's Report, par. 27.

(2) Ibid., paras. 28 to 36.

(3) Minutes of Evidence, pp.196-209.

Commissioners referred to were: "With the assistance of the Search Sheet it is feasible for the Keeper of the Register of Sasines to satisfy himself that the register does not disclose any palpable flaw in the progress of titles, and to be in what we may call fair safety in issuing a certificate of title, but it proves nothing more."⁽¹⁾ Their chief objection to the proposal was that it was precluded from the terms of their remit, and that in any event the proposal did not fall within the definition of a proper system of registration of title, which provides, firstly, for a register, entry wherein establishes the taker's title, complete and good against the whole world, and, secondly, for a certificate of title, giving the exact location and identification of the subject of registration.⁽²⁾

From the standpoint of orthodoxy, these criticisms are unassailable.

The other Commissioners believed in the feasibility of registration of title for Scotland, though they differed among themselves as to the mode in which it might be carried out. Mr Smith Clark and Sir Samuel Chisholm, for example, stoutly championed the proposal, maintaining that as a ready-made home

(1) Chairman's Report, par. 53.

(2) Ibid., paras. 55 and 56.

product it was equivalent to the normal type of registration of title. On the question of guarantee of title, they state: "The examination of the progress of titles having already been made at the Sasines Office, this examination should be guaranteed by "Government warrandice."⁽¹⁾ To the charge that the proposed Certificate would be unsatisfactory in respect of vagueness of description, they replied: "We are unable to see any force or objection to the "system, founded on the continuation for purposes of "a mode of description which has sufficed for dealings between individuals from time immemorial."⁽²⁾

*Government
guarantee of*

As is common knowledge, the ideal of registration of title was not advanced by this Report. The lack of unanimity amongst the Commissioners themselves for one thing, and the overwhelming opposition of the legal profession for another - a point on which all the Commissioners were agreed - put an end, temporarily at least, to any hopes that Scotland would fall into line with other countries in accepting a system of registration which is steadily encircling the globe. The mere fact, however, of setting up such a Commission has not been unproductive. Although the aim for which it was constituted was not

(1) Report by J. Smith Clark and Sir Samuel Chisholm, par. 14.

(2) Ibid., par. 19, S.2 (sub-sec.c).

to be realised, certain grievances of reformers got a good airing, thanks to which various improvements, such as the abolition of feudal casualties, the supersession of the Notarial Instrument by a deduction clause, the shortening of the life of entries in the Personal Registers, and cheaper costs generally in completion of title, have since been introduced.

The remit to Lord Fleming's Committee was of a totally different character. The Royal Commission was asked to consider the possibility of effecting a révolution in our whole system of registration and our law of transfer of real property. On the other hand, Lord Fleming's Committee was asked to "inquire into the processes of registration of writs in the Sasines Office, Edinburgh, and to report whether and to what extent any changes are desirable in the system of registration, or in the system of searches conducted in the Department, including the fees exigible for such Searches". The task allotted to these two bodies being quite different, naturally the line of investigation pursued by each of them differed also. But since the Search Sheet had now firmly established itself as a stepping-stone to all further progress in our system of registration, it was, as in all previous inquiries, subjected to a very critical examination by the Royal Commission, albeit this

examination was made from a different angle and with quite a different purpose in view. From this examination the Search Sheet emerged with its reputation greatly enhanced. This was quite understandable. In the course of years many imperfections which formerly characterised the growing pains of the experiment did not re-appear. The experience gained in the early stages of this experiment by its initiators was handed down to their successors, and knowledge which at one time was gained only after much cogitation and reflection mellowed into tradition. A better understanding of the structure of the Search Sheet and the principles on which it was framed was also in time forthcoming from the legal profession. At one time much criticism was levelled at the employment of what are technically known as "cross references" in the Search Sheet; but on reflection this criticism died down, and what was once regarded as a weakness has now come to be regarded as a merit. Most people now appreciate that without these cross references the Search Sheet would be incomplete and could not carry out its function. To borrow a metaphor from marine life, the cross references are to the Search Sheet what its tentacles are to the octopus. Aesthetically, also, the Search Sheet had undergone a transformation. Those who laboured at the document

in its early stages did so under conditions of extreme difficulty. When the Search Sheet was begun officials in the Sasines Office frequently had no option but to open a folio with a dealing covering a fragmentary portion of a large estate. Typical examples of this kind were Earldom and Barony Estates, the opening entry of which was merely one of the following: Feu Charter, Deed of Servitude, Long Lease, Order of the Inclosure Commissioners, or a Bond. In such cases many years sometimes elapsed before a transmission disclosed the magnitude of the estate and thus enabled the official to append a proper description at the head of the folio. The sheet on which such a correction fell to be made naturally became disfigured, and since such corrections were very common the general appearance of the whole document was not very prepossessing. The passage of time solved this as well as many other problems connected with the compilation of the Search Sheet, and to-day the document is prepared with such neatness as to give the whole an appearance as far removed from its early beginnings as a neatly engrossed writ is different from a roughly worked draft deed.

In view of what has just been said it becomes quite clear that Lord Fleming's Committee saw and examined a very different document from the one which

claimed the attention of the earlier Committees who had been called together to pronounce on its merits. Moreover, opposition to the Search Sheet, which had already begun to wane at the time of the Royal Commission, had by now almost entirely vanished. All told, at the time of the sitting of Lord Fleming's Committee everything spoke in favour of the legalisation of the Search Sheet, and this Committee interpreted the mood of our time when they advocated the legalisation of the document and the discontinuance of the Abridgments. The Committee also met the demand, which had frequently been urged in the past, for the duplication of the Search Sheet. They proposed the inauguration of a system whereby a Search Sheet, applicable to each property, be kept as a separate unit, the advantage claimed being that each property may be referred to independently, instead of, as at present, being sought out of a Volume containing probably the history of 300 different properties. They proposed to attain this object by making the Search Sheet to consist of cards, executed in triplicate.⁽¹⁾

Under the present system there are Indexes of Persons and Places both for the Search Sheet and the

(1) Par. 19 of Report.

Abridgments. The Index of Persons for the Search Sheet, however, differs from its like for the Abridgments in respect that it ignores all creditors except those who have exercised a power of disposal under their security rights, or who have acted in a capacity inferring proprietary right.

Lord Fleming's Committee wished to change this practice. They suggested "a Card Index of persons "(including all persons whose names appear in the "Index of Persons to the present Minute Book, and not "proprietors only, as in the present Search Sheet Index) would also be kept, probably in duplicate".⁽¹⁾

While there can be no questioning the usefulness of this proposal, it is, assuming we have understood it aright, open to the objection that the Card Index of Persons would under this new arrangement swell to proportions which would tend to obstruct the work of searching. It must be borne in mind that one name may suffice to indicate the proprietor of an estate at the head of a Search Sheet folio, whereas dozens of names may be necessary if all the creditors who have an interest in that property are to be indexed. The danger lurking in this proposal, so far as searching is concerned, is that one might not be able to see the wood for the trees.

(1) Ibid.

Very useful proposals were made by the Committee for facilitating reference to and between the various parts of the Record. This was to be ensured by adding the Search Sheet number to the Presentment Book, the Certificate of Registration and the Record Volume.

Incidentally, the abolition of the Minute Book involves a change in the law, which the Committee have not overlooked. We refer to the proposal that the date of ingiving in the Presentment Book should in future be the criterion of preference. This change would under any circumstances be more in harmony with actual practice. The objection to the present rule of preference arises from the fact that the Presentment Book itself writes the actual date of ingiving, whereas the date in the Minute Book, which at present governs the order of preference, is the manufacture of an official.

(2) Mechanical Substitute for Written Record.

As far back at least as the year 1858, the opinion had been voiced that the written record should be dispensed with in favour of a more up to date method of compiling the Record. In a Report by the Council of the S.S.C. Society printed in 1858, we find a recommendation in favour of a printed Record.

The plan there foreshadowed was as follows: the principal writ handed in to be recorded to be accompanied by a draft or a copy of the writ, the latter to be sent immediately to the printer to be booked, the principal writ, meantime, being used by the Keeper for framing the Minute. When the proof-sheets were returned from the printer, these were to be compared with the principals; and, after correction, as many copies as may be required thrown off. The Principal Keeper or his Chief Assistant were to compare a final copy with the principal writ. When this process was complete, the principal writ along with the draft or copy was to be returned to the Ingiver, the former bearing the certificate of registration.

The advantages claimed for this scheme were, inter alia, saving of time, greater accuracy, deposit of a copy in the localities for reference, and the supersession of the Abridgments by the Printed Record for searching purposes.

This project was considered by Messrs Morton and Bannatyne,⁽¹⁾ who, however, rejected it on the ground of expense, and, rightly, also on the ground that the Printed Record could not replace the Abridgments for searching purposes, as was claimed for it.

(1) Report, pp.36 and 37.

The proposal of the S.S.C. Society was also reviewed by the Select Committee of 1866. At the time this Committee held its sittings, the process of Zinco-photography, an invention of Lieut.-Col. Sir Henry James, was being successfully applied in the Topographical Department of the Board of Ordnance, so the Committee called this gentleman before it to give an account of his invention and also to find out from him whether it would not be more advantageous to accept it as an alternative to printing the Record. Their finding was in favour of the photographic process, and they inserted a clause in the Bill empowering the Lord Clerk Register, with the consent of the Treasury, to apply that process as a substitute for the written record. They counselled caution, however, and suggested that trial should first be made of the process, and should it be found that the same could not be substituted with due regard to safety or economy for the present system, then the possibility of printing the Record might be again considered by the Treasury. This clause, however, was dropped out of the Act.

Later on, Lord Lee's Committee formed an unfavourable opinion on the question of superseding the written Volume by printing "or any particular system" for reproducing in facsimile the writs ingiven for

"registration".⁽¹⁾ The decision of Lord Lee's Committee evidently did not command universal approval, for we find that a printed Record and the reproduction of writs by the process of photo-lithography were proposed in the Bills of 1893 and 1895, respectively.

It fell to the lot of Lord Low's Committee to make a thorough investigation into the whole matter. On the strength of their enquiries they decisively rejected any suggestions for a Printed Record. On the other hand they recommended the introduction of photo-zincography because it possessed the following advantages: (1) distribution of the record to the counties, (2) copying of plans - thus making descriptions by plan intelligible to a reader of the Record, (3) easier examination of a Record consisting of facsimiles, (4) elimination of collation, and (5) facility of giving extracts, where writs are recorded for preservation.⁽²⁾

A Provision more or less embodying this latter recommendation was inserted in each of the Bills of 1899, 1900, 1901 and 1903.

As will have been noticed, after the year 1903 and until the appointment of Lord Fleming's Committee,

(1) Quoted from Lord Low's Committee Report, par.495.

(2) Paras. 243 and 244 of Report.

there was, generally speaking, a lull in the campaign for reform of the system of registration, with the result that no further action was taken on this matter. In the interval between the investigation by Lord Low's Committee and the one undertaken by Lord Fleming's Committee, photographic reproduction had made vast strides, and the latter Committee therefore had an opportunity of considering the introduction of the Photostat process of recording writs. The latter Committee were convinced of the saving of time, labour and expense that would be gained by the introduction of the Photostat process; but in the absence of clear proof - which at the time of their enquiry could not be furnished - of the permanency of the Record under that process and of a sufficient supply of home-produced paper being always available for the experiment, they were not prepared to advocate its immediate adoption.

Since that time complete satisfaction was obtained on these essentials, and the Photostat process was accordingly introduced into the Register House in April, 1934, giving the benefits which were forecasted in the Report by Lord Low's Committee. A copy of the Record, however, is not sent to the localities.

Now that this reform has been carried through,

there seems no valid reason for keeping up the distinction between extracts from the Sasines Register and those from the Books of Council and Session. Possibly this question may receive attention in some future Act of Parliament.

INTRODUCTION.

Within the last 50 years three important classes of rights affecting land in Scotland, namely, Forfeiture, Wardship, and Curatela, have been abolished. The rights of Curatela and Wardship were admitted to registration in the General Register of Sasines, with great benefit to the holders of these particular rights. Before this took place the Registers of Sasines had not attained their full development, whereas now one may affirm that almost every type of right in land known in Scotland, past or present, is represented on the Land Register.

There are still some interests in land which do not require to be registered, or have never been registered, but these are few and their registration has not improved the usefulness of the register, nor does it enable anyone to dispute a claim to possession of land by anyone who is not registered. The exceptions are mainly such as are founded on

P A R T III.

LAND RIGHTS ASSIMILATED BY THE
FEUDAL REGISTERS.

INTRODUCTORY.

Within the last 80 years three important classes of rights affecting land in Scotland, namely, Burgage, certain sorts of Leasehold, and Real Burdens have been admitted to registration in the General Registers of Sasines, with great benefit to the holders of these particular rights. Before this took place the Registers of Sasines had not attained their full development, whereas now one may affirm that almost every type of right to land known in Scotland, past or present, is represented on the land register.

There are still some interests in land which do not require to be registered, or have never been registered, but these are not many, and their omission has not impaired the usefulness of the register, nor does it enable anyone to dispute Scotland's claim to possessing a complete system of land registration. The exceptions are mainly such as are founded on

privileged status or tenurial or other specialties.⁽¹⁾

They comprise:-

1. Estates of the Crown and Prince, but exclude private estates of the Monarch or his son;
2. Churches, Churchyards, Manses and glebes of the Church of Scotland, including glebes acquired by excambion;⁽²⁾
3. The remains, if any, of udal land in Orkney and Shetland which have neither been feudalised nor transmitted by titles, feudal in form;
4. Subjects anciently granted to burghs and universities "where an original infeftment may be assumed, perhaps before "the institution of land registers";⁽³⁾
5. Leases at common law and under the Statute of 1449 c.18, possession taking the place of infeftment;
6. Kindly tenancies, some of which, however, now pass by feudal forms and have therefore been registered; and the somewhat modern variants of kindly tenancies

(1) See Dr E. M. Wedderburn: Art. on Completion of Title, Encyclo. of Scots Law, Vol.iv., pp.70-1.

(2) Cadell v Allan, 1905, 7 F.606.

(3) Wallace v St. Andrews University, 1904, 6 F.1093.

introduced by the Dwelling Houses
(Scotland) Act 1855⁽¹⁾ and the Small
Landholders Acts from 1886 to 1931;⁽²⁾

7. Servitudes; and

8. Assignations to liferents.⁽³⁾

(1) 18 & 19 Vict. c.88, Sects.13,16 and 18.

(2) 49 & 50 Vict. c.29. 50 & 51 Vict. c.24.
 54 & 55 Vict. c.41. 1 & 2 Geo.V. c.49.
 9 & 10 Geo.V. c.97. 21 & 22 Geo.V. c.44.

(3) Ersk. 11, 9, 41.

CHAPTER 1.ORIGIN, DEVELOPMENT AND DISCONTINUANCE
OF THE BURGH REGISTERS.Section I. EARLY ORIGIN OF BURGH REGISTERS.

As already noticed, writs relating to lands lying within the liberties and freedoms of free burghs, held in Burgage, were excepted from the scheme of registration established by the Registration Act of 1617. The exclusion of burgh writs from that Act is generally ascribed to the fact that the Burghs were wont to keep registers of their own; but this explanation does not seem to give satisfaction at all points.

From a survey of the history and development of the burghs which we give below, we venture to think that some justification will be found for the assertion that, irrespective of any custom among the burghs with regard to the registration of burghal infeftments, the legislature at the beginning of the 17th century was not in a position to enforce the Act of 1617 on the royal burghs.

In a previous chapter we discussed how it came about that the burgess-class was the first group in feudal society to develop the mercantile instinct, and also why this group could not exist unless it developed laws of its own for the transfer of property.

Scotland was no exception to this phase of

economic growth. The rise and subsequent development of the Scots burghs, therefore, was no isolated phenomenon.

While it may be true that the development of towns was a later growth in Scotland than in Western Europe, burghal nuclei probably existed in Scotland from a very early date.

Our oldest burgh charters may be traced only to the reign of William the Lion, yet even these "point plainly to a previous burghal organisation",⁽¹⁾ and there is also charter evidence of the prior existence of burghs, although these had probably not attained to the rank of a royal burgh in "the legal sense of the name".⁽²⁾ A fact which cannot be overlooked is that the charters of William the Lion were not charters of erection, but charters given in response to the wish of fully developed burghs, which wanted their status and privileges confirmed in writing.

Even before David I.'s time, "free towns in considerable number must already have existed both to the North and South of the Tweed".⁽³⁾ Although there are not many data on the subject, we know there

(1) Cosmo Innes: Ancient Laws and Customs of Burghs of Scotland, Vol.I., p.xxxv.

(2) General Report of the Commissioners on the Municipal Corporations in Scotland, 1835, p.9.

(3) Hume Brown: Hist. of Scotland, 1898, Vol.I., 91.

actually was a confederacy of certain towns in the north of Scotland in the region lying beyond the Mounth, for the advancement of their common interests, which did not survive the War of Independence.⁽¹⁾

Further south there existed at the same time a similar confederacy of the four towns of Berwick, Roxburgh, Edinburgh and Stirling, known as the "Association of the Four Burghs", whose history is much better known and out of which grew the Convention of Burghs.

As proving the growth of towns before the reign of King David I., in the charters granted by him which were not charters granted to individual burghs, 12 towns are mentioned as being burgo meo, namely, Aberdeen, Berwick, Crail, Dunfermline, Edinburgh, Elgin, Haddington, Inverkeithing, Linlithgow, Perth, Roxburgh and Stirling. Peebles and Linlithgow are also referred to in his reign as burghs.⁽²⁾

It is stated that portions of the two codes of law relating to the Burghs, the *Leges Quatuor Burgorum* and the Statutes of the Merchant Guild of Berwick, go as far back as the reign of David I.⁽³⁾ If this be the case, there must then have existed "if not at a

(1) Hill Burton: Hist. of Scotland, 1867, II. 174.

(2) I. F. Grant: Social and Economic Development of Scotland before 1603, pp.122-3.

(3) Ibid.

"still earlier period, burghs royal of a structure
 "and constitution not essentially different from
 "those of a more recent date".⁽¹⁾

When we come to the reigns of Malcolm IV., William the Lion and their successors the two Alexanders, we find that an appreciable number of the present royal burghs in Scotland had attained their full legal rank. In their grants to the burghal communities these monarchs seem to take the previous corporate existence of the burghs as a special or urban group for granted. At any rate, there is not, in these grants, any 'direct exercise of the royal prerogative in the creation of a body corporate'.⁽²⁾

Although the Royal Burghs in Scotland were, in a certain view, almost independent, self-governing bodies, there were radical dissimilarities between them and many of the municipalities of Europe of the Middle Ages. The latter were independent states, and, as such, they enjoyed sovereign power, and pursued a political policy of their own. The former, however, were in all cases direct creations of the Crown. In theory, at least, every Royal Burgh in Scotland behaved to have been created by a Royal Charter, and the special characteristics attaching to

(1) General Report of the Commissioners, *supra*, p.9.

(2) *Ibid.*, p.10.

the foundation of each burgh, whether expressed or not, were, that in its corporate capacity it was fitted into the feudal hierarchy as a vassal of the Crown, that it could not create a vassal below it, and that every individual burgess was a direct vassal of the Crown.

However they may have differed in other respects, both the Royal Burghs of Scotland and the urban communities on the Continent had one feature in common. There is an old German saying which runs, "Stadt luft macht frei". Alike the inhabitants of the Royal Burghs of Scotland and those of the burghs on the Continent were animated by a spirit of hostility to feudalism.

This spirit was the outcome of an outlook on life bred by economic aspirations, widely different from those which prevailed in feudal society, and it brought the Royal Burghs of Scotland into close relationship with the monarchy.

The connection between the Royal Burghs and the King worked out to their mutual advantage. The Monarch was not slow to perceive the usefulness of the burgh as a civilizing influence which was in touch with a much wider world. According to one charter, Alexander II. gave privileges to Dumbarton, his object being to convert that town into a cultural

barrier against "a lawless and wild kind of man dwelling in the neighbouring mountainous parts".

The value of the Burghs as sources of income for the Royal Treasury and also as channels for conducting the economic life of the country were even more important. The burgesses paid rents for their tofts, and tolls and dues upon their exports and imports. They were established in various parts of the country, each of which, under a standardised form of charter, was made a trading centre with exclusive privileges of trade over surrounding tracts of territory. When they were fewer in number the amount of territory over which each burgh held sway was of considerable magnitude. For example, the liberties of Inverkeithing at one time embraced a tract of territory which later comprised the burghs of Kinross, Burntisland, Kirkcaldy and Dysart, and those of Rutherglen a territory not much less in extent.

The purpose of this arrangement, from the point of view of the personal interests of the King, was to strengthen the burghs as flourishing and prosperous communities, in order that they might be able to render him in return those services - fiscal and military - which would enable him to consolidate his position against his ambitious and unruly nobles.

So far as the Burghs themselves were concerned,

this political and economic relationship gave them a preponderant influence in the social and economic life of the state. They might look to the King, who was their patron, for protection, and they enjoyed internal peace, which was denied to the rest of the country.

Under the planned legislation of the Scots Kings of the 12th and 13th centuries, they were favoured with a monopoly of the whole export trade of the country, and the buying and selling of commodities produced over wide tracts of territory were reserved to the merchants of the royal burghs. Of much value was also their monopoly of the right to hold fairs and markets. So jealously was this monopoly guarded that until the 16th century Brechin was the "only example of a non-burghal market in Scotland".⁽¹⁾

Powerful as the Church and the feudal lords were, they were not permitted to encroach upon the privileges of the burghs. Prelates, nobles and barons were made to toe the line with the rest of the landward population. A few concessions, indeed, were granted from time to time to Churchmen, but these merely serve to emphasise the rigidity of the policy that trade was to be concentrated in the royal burghs.

(1) I. F. Grant: Op. cit., p.132.

Later Kings continued this policy. David II. gave a Charter of Confirmation, dated 28th March, 1364, conferring on all the burgesses throughout the land the liberty to buy and sell everywhere within the liberties of their burgh, but not within the bounds of another without licence. He also prohibited foreign merchants from buying and selling merchandise to anyone but a burghess. No ecclesiastic or secular person was to purchase any merchandise, nor sell any but to a merchant within whose liberty he resided.⁽¹⁾ As late as the year 1633, all these privileges were once more confirmed by an Act of Parliament, which ratified all previous Acts and Constitutions of Parliament relating to the privileges of Royal Burghs, and especially the Acts passed in the years 1461, 1503 and 1592.

In passing it may be noted that eventually the Churchmen, who were not blind to the advantages accruing to the Royal Burghs, were successful in securing the status of royal burghs for the towns which grew up round the ecclesiastical centres. As price of the privileges which went with this status, the Church burghs had to pay their quota of the taxation fixed on all the royal burghs, and by the year 1555 they were all members of the Convention of Royal Burghs.

(1) R.C.B. I., pp.538-41.

So much for the economic role of the burghs. A survey of the general character of their corporate institutions is of equal service to us, and, therefore, should not be omitted.

The burgh as a complete entity was not built up in a day, but very gradually. In earlier times, before they had attained full legal status, the internal life of the burghs was supervised by an officer of the King, but with the growth of their corporate importance they were able to bargain for arrangements which left them more free to manage their own affairs without interference from the King or his officers.

At one time also the individual burgess stood in closer relationship to the King than he did to the community. His status then depended solely upon his ownership of a burgage tenement, or in other words, upon his being a Crown tenant, and not upon any freedom conferred on him by the community. According to the Laws of the four Burghs, no one might be made a burgess who could not do service to the King for at least a rood of land, and a churl even, living outside the town, had the right of a burgess if he had property within it.⁽¹⁾

The burgesses at that stage were, therefore, mere valuable tenants of the Crown, and the rents due

(1) I. F. Grant: Op. cit., p.124.

for tofts within the burgh were collected on behalf of the King by his own personal officials - praepositi or ballivi - working under the direction of the King's Chamberlain.

These praepositi remitted the monies collected by them and the rents and fines pertaining to the Chamberlain's Court, as well as the petty customs direct to the Exchequer. But the range of duties of the praepositus was more extensive. "In several laws he is spoken of as responsible for the King's reign within the burghs".

In the course of the 14th century the burgesses were fired with the ambition of possessing a greater measure of fiscal autonomy, and they brought this aim well within their reach through paying an annual sum under lease from the King in lieu of having their rents, fines of courts and petty customs collected on behalf of the Exchequer. By the end of that century many of the burghs had obtained permanent feus of these sources of revenue. It is as well to state, however, that they were in part helped to reach their object owing to the collection of these revenues having fallen into disuse.

A unique feature of the history of the Scots burghs was the faculty which they had at all times displayed of acting in unison. In this respect they

formed a complete contrast to the English boroughs. Owing to the similarity of their charters of erection, Scots burghs were, so to speak, members of one family, and combined action was, therefore, much easier for them than it was for their fellow-townsmen in England. In England the parentage of burghs was mixed. Says Oldfield on this subject: "When any tythings or "boroughs became possessed of that consequence of "trade as to be worth the acceptance of royalty or "nobility, they were taken under the patronage of the "King or his nobles."⁽¹⁾ Because of this dissimilarity of origin and their subordination to aristocratic influence, there was no common basis for united action on the part of the English boroughs.

The tendency of the Scots burghs to act in co-operation was manifested at an elementary stage of their existence. Their purpose in doing so was not a political one. As has been stated, "feudal loyalty "led the lesser barons to associate themselves with "the nobility, while the burgesses generally "pursued a lone path, interested in economics to the "exclusion of politics and struggling for their own "welfare and profit".⁽²⁾

(1) F. H. B. Oldfield: History of the Boroughs of Great Britain, Vol.I., p.114.

(2) J. D. Mackie and G. S. Pryde: The Estate of the Burgesses in the Parlt. of Scotland, p.1.

Economic interests, therefore, were the motives which led to a union of the burghs. Moreover, with their trading interests in mind, they were fully alive to the importance of adopting a code of laws and customs, regulating private rights and private conduct, which would be uniform throughout the burghs. The "Hanse" of the Northern Burghs, it is believed, afforded a good illustration of this tendency, and more indubitably so, the still more famous confederacy of the four Southern Burghs. From the assemblies of the latter burghs is supposed to have emanated the *Leges Burgorum*, which were sanctioned by the legislature in the reign of David I. and which became the law of all the burghs of Scotland, "the charters of many of which are drawn verbatim from its provisions".⁽¹⁾

Our knowledge of the constitution of the burghal authorities at this early period is not complete, but it is known that the powers and duties of the burgh officials of that time were very extensive compared to those of the magistrates of a modern municipality. The burgh courts of that age had jurisdiction in all causes, both civil and criminal, saving the four pleas of the Crown, and they could inflict capital

(1) Cosmo Innes: *Op. cit.*, p.iii.

punishment. In the sphere of private law, the burgh laws dealt with the rights of citizens to will their estates, the rights of married women over their own property, and the custody of the property of a minor, all in a manner entirely foreign to the spirit of feudal custom.

The Curia Quatuor Burgorum, which, at first, was confined to the four southern towns of Berwick, Roxburgh, Edinburgh and Stirling, changed its composition. Gradually it absorbed all the Royal Burghs in Scotland. In 1405 all the burghs south of the River Spey were ordered to meet annually to discuss and take measures upon their common welfare, and in 1454 the meeting place of this larger assembly was fixed in Edinburgh.⁽¹⁾ Thus the tendency, before the War of Independence, of the burghs to act in concert and to secure legislation for themselves as a confederacy was even more pronounced in the 15th century, and this tendency was encouraged by the central authority. Carried a stage further, it reached its highest point with the institution of the Convention of the Royal Burghs in the latter half of the 16th century.

The advantage to the Burghs of having a separate representative institution cannot be over-estimated.

(1) Cosmo Innes: Legal Antiquities, p.114.

The Convention was composed of delegates from all the free burghs and they met upon their own initiative.

An examination of the Records of this Convention will reveal how many and how varied were the interests of the Burghs. Every matter connected with their intricate trading interests, whether at home or abroad, received attention. The Convention defined the rights, privileges and duties of the various burghs, and assessed the proportions of all extents and taxes to be paid by its separate members. It also submitted propositions to Parliament in regard to all matters of wider importance, affecting the country generally.⁽¹⁾

Of particular interest as shewing the value which the Burghs attached to co-operation amongst themselves is an Act of the Convention of 1586, appointing the Burghs to meet separately prior to each assembly of the National Conventions and Parliament. This was a matter which the Convention did not treat lightly. Thus in 1595, it decreed that no single burgh should give in an Article to Parliament, without first apprising and consulting the other burghs, under pain of a fine of £100.⁽²⁾ All told "the conclusion is that during the reign of James VI. the

(1) J. D. Marwick: R.C.B. I., p.xiii.

(2) R.C.B. I. 469.

"burghs developed and perfected a system to give expression to their essential unity as an estate of the realm in every matter touching their welfare and interests".⁽¹⁾

In view of the tenacity with which the Royal Burghs clung to all their privileges and the dogged stand they made for the maintenance of their own institutions, we are inclined to think that there may have been opposition on the part of the Burghs to the inclusion of their registers in the Act of 1617.

In a previous chapter we referred to the very early institution of burghal registers on the Continent. So far as Scotland is concerned, there were, in addition, tenurial considerations which help to explain why the Royal Burghs anticipated the rest of the country in the matter of land registration.

In Scotland, during the burghal period, each burgess had his lot of ground within the town, which was highly prized, and for very good reasons too. As stated by Stair⁽²⁾ "Infeftments in burgage subjects are those which are granted to the burghs by the King, as the common lands or other rights of the incorporations, and that for burghal service in watching and warding within their burghs. These

(1) J. D. Mackie and G. S. Pryde: Op. cit., p.42.

(2) Stair, 2. 3. 38. Urquhart v Clunes and Others, 17 Jan. 1758, M.15,079.

"can have no casualties, because incorporations die
 "not, so their lands can never fall in ward or in non
 "entry and the particular persons infeft are
 "the King's immediate vassals, and the Bailies of the
 "Burgh are the King's Bailies."

In the case of some Royal Burghs, however, such as St. Andrews, Glasgow, Dunfermline and Kirkcaldy, which were formerly Burghs of Regality, and Dysart, which was formerly a Burgh of Barony, the lords of superiority had preserved their rights to the superiority.⁽¹⁾

Under the peculiar conditions of burgage tenure the owner of a burgage tenement was much to be envied. As compared with a proprietor under other feudal tenures, he paid no feuduties;⁽²⁾ he was not liable in any casualties;⁽³⁾ and he had greater freedom of alienation. In offset to these advantages, he could not sub-feu.

As representing the King, the Magistrates of Royal Burghs always had authority to receive and enter vassals holding burgage, either upon resignation, or retour, or immediately by hasp and staple.⁽⁴⁾ The

(1) Hope's Minor Practicks, 1734, pp.319-21.

(2) Mags. of Arbroath & Dickson, 1872, 10 M.630.

(3) Ersk. 2, 4. 8 and 9.

(4) Hope, *ibid.*, p.317.

first and last of these modes of entry were characterised by their cheapness, as compared with analogous transmissions under ordinary feudal tenures. There was yet another mode of transmission available to an heir entering upon his predecessor's lands within burgh - a process called cognition, in reality a burghal retour, which enjoyed a similar advantage. So far as Sasine upon hasp and staple was concerned, it was merely the assertion of a clerk of burgh and as it was not specifically mentioned in the Act of 1617 on prescription, its efficacy as a warrant for prescription was at one time questioned,⁽¹⁾ but this doubt was latterly dispelled.⁽²⁾

The methods mentioned above of completing title were uniform throughout the burghs, except Lauder and Paisley.

In the burgh of Lauder, a peculiar type of infestment was current for a considerable time. In that burgh a certain piece of ground granted in early times to the town was divided into 315 "Burgage Acres" - subsequently reduced (in 1744) to 105 - which were to be possessed by the same number of burgesses, the object evidently being that there were to be no more burgesses than there were acres. The owners of these

(1) Heriot's Hospital v Hepburn, 1697, M.10,812.

(2) Ker v Abernethy, 1705, M.10,813.

"acres" enjoyed exceptional privileges, not found elsewhere in Scotland. In point of fact, however, the number of landowners continually varied, descending to as low a number as 25 in the year 1835, but rising again to 69 in 1854.⁽¹⁾

Concerning these "Acres", Hope⁽²⁾ wrote "a purchaser or heir to one of the 'Burgess Acres' "was never infeft but possessed by an Act of the "Burgh Court".

At the present time, as we are informed by Mr Doughty, the present Town Clerk, 55 persons in all own the 105 Acres, almost half of which have been merged with adjoining estates, and the procedure on infeftment is the one followed in the General Register of Sasines.

Paisley is not a royal burgh. Its ancient proprietors were rentallers of the Abbey of Paisley, and the town owed its origin to the existence of a monastery, founded by Walter, Steward of Scotland in 1163. It is possible that the peculiar history of this burgh accounts for the origin, in this burgh alone, of the tenure of booking, so called "because the titles "of proprietors are entered in a book or register kept

(1) Municipal Commissioners' Report, 1835, Vol.II., Part II., 199-200. Lauder & Lauderdale, A. Thomson, p.42.

(2) Hope: Ibid., p.325; Wilkinson & Cranston, 1663, 1 Br. Supp. 488.

"by the town clerk which comes in place of the burgh "register of Sasines". Before 1874, titles to land held under this tenure contained an obligation to book and secure in place of the usual obligation to infeft. The tenure has been compared with copyhold in England, in respect that title did not pass by infeftment, but that a "minute of the entry of an heir, "or a transmission by conveyance is engrossed in a "book kept by the town clerk, which is held to be "equivalent to a sasine".⁽¹⁾

From what has been stated it is apparent that a burgess possessed in his burgage tenement an acquisition which it was clearly in his interest to safeguard, and registration, therefore, which, in a popular sense, is a book-keeping transaction, made a definite appeal to him. On the other hand, it was equally in the community's interest to have complete knowledge of all land transactions within the burgh. The means of acquiring that knowledge was well within their command, because infeftment in burgh lands could only be given by the bailie on behalf of the community, as representing the Sovereign, and the Sasine expedite on the ceremony was not extended by a common notary but by the town clerk in virtue of his office as burgh notary.

(1) John Russell: Theory of Conveyancing, 1791, p.220.

For very good reasons, the custom of confining the execution of the whole procedure of infeftment to their own representatives was jealously guarded by the burghs. We learn of one instance, which occurred in 1551, of a bailie losing the freedom of his town for giving sasine without the consent "of the ourisman and commite", and of the act done by him ordered to be erased from the town's books.⁽¹⁾ When the burghs had reason to fear, as they did about 1567, that Sasines of burgh lands were being given privately, they were instrumental in getting an Act passed which declared all Sasines null that were not given by 'ane bailie and the clerke'.⁽²⁾

The Town Clerks' monopoly of extending and booking sasines was not one which they would lightly give up.

Section II. BURGHE REGISTERS PRIOR TO THE ACT OF 1681, c.11.

Prior to the Burgage Registers Act of 1681, with the possible exception of the Act of 1669 (c.3), the registration of writs dealing with burgage property

(1) Records of Burgh of Prestwick, Maitland Club, p.62.

(2) Vide 1567, c.34 (iii, 33).

was not made the subject of any positive statutory enactment.

In a negative sense only, it was referred to in the Acts of 1559, c.29, and the Secretary's Register Acts of 1599 and 1600. Under the 1559 Act all reversions, but not those of land in burgh, were declared null unless registered, and, as already stated, Instruments of Sasine and Reversions of land within burgh were specifically excluded from the operation of the other Acts on registration.

Mackenzie in his Observations on the Act of 1617 ascribed the exclusion of burghal sasines to the exactness of town clerks in recording them in their books. Regarding this belief, Erskine⁽¹⁾ pointed out that, at any rate, it would not hold with regard to reversions, because these might have been granted without the cognisance of the town clerk.

The Act of 1669, c.3, it will be remembered, remedied a defect of the principal Act of 1617. This Act, on a par with the principal Act, did not admit Instruments of Resignation ad remanentiam of lands held burgage to the feudal register. Nevertheless, there was a vital difference in the wording of the exception in the Act of 1669. After appointing these instruments to be registered "in the same manner

(1) 2. 8. 12.

and way" as Sasines, etc., it goes on to declare "That the Instruments of Resignation of Tenements, "Lands and Fishings holden in free burgage being "registrat in the Town Court Books of the Burgh shall "not fall within the certification of this present "Act".

Concerning this part of the Act, Mackenzie⁽¹⁾ wrote, "It seems they (i.e. Instruments of Resignations ad remanentiam) must be registrated within the "Town Court Books within the same 60 days." Erskine⁽²⁾ expressed the same opinion without reserve.

If the wording of the Act were taken literally, no other rendering of its meaning was possible. Yet, if this were allowed, an anomalous situation was being created, in as much as one type of deed was invalidated because of failure to register in the burgh books, whilst there was no utterance on the necessity for recording even more important burghal transactions.

It is noteworthy that no mention of the burgh registers or the manner of their keeping is to be found in the Records of the Convention of Burghs. From this fact, coupled with the almost complete lack

(1) Observations on Statutes, 1687, p.428.

(2) ii, 7. 20.

of direction by Parliament, it may be presumed that the institution of burgh registers was a voluntary growth in each burgh.

One can hardly speak of the commencement of the Burgh Registers as a whole, because there was so much diversity in the way they were kept, particularly in the early stages. In any event, Burgh Registers, in the proper sense of the term, were not begun simultaneously in all the burghs. Probably some burgh took the lead and others paid it the compliment of imitation.

In earlier times the booking of burgh sasines was carried out in an irregular manner. For a long time the notarial system dominated over all other methods of registration, and, more often than not, evidence of sasine was preserved in protocol books of the burgh notaries, which the burghs were not always able to procure from their archives.⁽¹⁾ Later on, at least in some burghs, Sasines were booked direct into the town's books, but the register was frequently intermixed with other municipal records, such as proceedings of the local court and Minutes of town council meetings. Altogether it would seem that the improvement of keeping a separate book for the

(1) See List of Burgh Protocols, preserved; Art. on Notarial Protocols by Wm. Angus; Sources of Scots Law; Stair Society, p.289.

insertion of sasines became more general late on in the 17th century - a development no doubt fostered by the example of the feudal registers.

Having no guidance on the manner in which a Register should be kept, each burgh suited itself as to the method of registration; and, to a very great extent, it depended on local circumstances, or local personalities, whether a particular burgh had a reliable Register or otherwise. But, after making allowance for the lack of business methods characteristic of the times, and also for the general standard of education and trustworthiness, one is inclined to believe that the burgh registers, or their notarial equivalent, were, latterly at any rate, carried on in a fairly accurate and regular manner. Certainly, a study of the Records of the Burghs, so far as these have been examined and their contents made available to the public, does not incline one to charge burghal authorities with gross neglect of their duty with regard to the supervision of the registers under their care. On the contrary, one is often struck by the extreme anxiety displayed by the magistrates, on frequent occasions and in many places, to preserve documentary evidence of burghal grants, and to acquire, even at considerable cost, portions of the register which may have been retained by the common

clerks and their representatives.

Thus, the Magistrates of Kirkcaldy appointed a Town Clerk on 25th August, 1596, subject to his giving an undertaking that he "sowld make and provyd "ane prothegall buik to buik the haill Instruements "of Sasing gevin be the baillies of the burgh "during the time of his office to be furthcumand to "the curt efter his departure".⁽¹⁾ The Burgh Records of Glasgow, especially, provide signal proof of solicitude for the registers. Believing that extortionate prices were being charged for booking of sasines and for extracts, the magistrates in the year 1612⁽²⁾ laid down fixed prices for this work for the future, which they solemnly bound their clerk, appointed a little over a year later, to adhere to under pain of deprivation of his office.⁽³⁾ Later on, in 1625, we find the magistrates paying 200 merks to the son of this town clerk for his father's protocol books,⁽⁴⁾ and fifteen years later they decreed that "the haill "protocols of preceding clerkis shall be keiped in "the townes charter cabinet and the clerk onlie to

(1) L. Macbean: Burgh Records, Kirkcaldy, pp.140-1.

(2) Burgh Records, Glasgow: Burgh Records Society, 1573-1642, p.334.

(3) Ibid., p.335.

(4) Ibid., pp.348-9.

"have the use of thame as he sall have need of tran-
 "suming seasinges and to give his tiket of the
 "receipt of the samin to the keepers of the keyis of
 "the said Chartour cabinet", and, in addition, the
 clerk to produce his protocol to the Council every
 quarter day "that thair it may be sein and knawin
 "that all the seasinges giffin in be registrat".⁽¹⁾
 Again, we find the Magistrates of Inverness⁽²⁾ at-
 tempting to make good the loss of a volume of the
 register from November 1650 to 1st January 1662
 which had gone amissing, by calling upon the inhabi-
 tants to produce their sasines for re-recording.
 Other instances may be culled from the Records of
 Dysart⁽³⁾ and Irvine⁽⁴⁾ which assure us that care for
 the welfare of the registers was not confined to a
 few burghs only.

Unfortunately, the contents of all or even a
 majority of the Burgh Records are not available to
 the present generation - a great many of them, indeed,
 have perished. As far as can be derived from the

(1) Ibid., p.421.

(2) Records of Inverness: New Spalding Club; II,
 227.

(3) Notices from the Local Records of Dysart: Mait-
 land Club, p.43.

(4) Muniments of the Burgh of Irvine: Ayrshire and
 Galloway Archaeological Society, II, p.177.

Records of those burghs which have been made available in printed form, the burghs which probably furnish evidence of the early booking of sasines in separate register books, or books belonging exclusively to the burghs, as distinct from protocol books, are Cullen⁽¹⁾ from 1633, Dunfermline⁽²⁾ from 1455 and Peebles⁽³⁾ from about 1483. It also appears that separate books for the booking of sasines were kept for the Burgh of Stirling prior to the year 1552.⁽⁴⁾ Contrary to preconceived notions, perhaps, the Burgh of Edinburgh had not instituted the practice of recording sasines exclusively in a separate register book until the year 1617; moreover, until 1602 the task of booking sasines affecting her burghal lands was entrusted to miscellaneous hands.⁽⁵⁾ Likewise, Glasgow⁽⁶⁾ instituted a regular series of Registers in 1694 only.

(1) Vide Wm. Cramond: Inventory of Books of Sasines belonging to Burgh of Cullen, 1887.

(2) Erskine Beveridge: Burgh Records, Dunfermline, p.xv.

(3) Wm. Chambers: Charters, &c., of Peebles, 1165-1710. Burgh Records Society, p.50.

(4) Extracts from Burgh Records of Stirling, 1519-1666, p.60.

(5) Protocol Book of John Foular, pp.viii. and ix.

(6) R. Renwick: Abstracts of the Protocols of the Town Clerks of Glasgow, I., p.xv.

While we have stated that the custom of booking sasine in the burgh registers was, on the whole, fairly regular, yet it cannot be denied that there were serious lapses and neglects, which must have impaired the usefulness of the early registers. The blame for this situation, where it arose, must undoubtedly be imputed to uncertainty as to whether the custom of booking burgh deeds had then the force of a rule of law, or not.

If the view were correct that burgh writs were excluded from the Act of 1617 solely because of the regularity with which town clerks kept their registers, then there is some room for thinking that, in accordance with this belief, the Court ought to have insisted on registration in the burgh registers as a necessary step towards the completion of infeftment, thereby establishing de jure what was already supposed to have been established de facto. However, the fact was that the Court consistently upheld a different standpoint, and it sustained sasines which were not registered in the burgh books.⁽¹⁾ Regarding the case of Thomson v McKettrick, Dirleton reported:

"The Lords found that the said seasin being within
"burgh, though not under the hand of the clerk, was

(1) Thomson v McKettrick, 1666, M.6892; Burnet v Swan, 1668, M.13550; Swan v Burnet, 1676, M.13550.

"not null upon that ground that it was not registrate,
 "because though the reason of the Act of Parliament
 "for registration of seasins and the exception within
 "burgh be, that seasin within burgh are in use to be
 "registrate by the clerks in the town books, yet the
 "said reason is not expressit in the Act of Parliament,
 "and the Act of Parliament excepting Bural seasins,
 "the party was in bona fide to think that there was
 "no necessit of registration."(1)

A similar decision was made with regard to re-
 versions of tenements within burghs.(2)

In passing we may remark on the strange state of
 affairs which existed with regard to infeftments of
 subjects in the town of Leith, which was not a Royal
 Burgh. It had been customary for the magistrates of
 Edinburgh to give infeftments of land situated in
 Leith, and because of this practice, which was said
 to be perpetual, a sasine neither registered in the
 feudal register nor in the burgh register was sus-
 tained by the Court.(3)

(1) Dirleton's Doubts; Decision 22.

(2) Halyburton, 1681, M.13555.

(3) Edmiston, 1623, M.3105.

Section III. STATUTORY INSTITUTION OF THE BURGH
REGISTERS.

Having regard to the exception of the Burgh Registers from the Act of 1617 and the consistent refusal of the Court to annul writs which were not registered, the position of the registers prior to their statutory institution in 1681 (c.11) was very unsatisfactory, both from the point of view of the public and the integrity of the registers.

The public did not know where it stood, and town clerks were tempted to take a lackadaisical view of their duties. The Court of Session, especially, had ample opportunities of reflecting on the absurdity of safe-guarding the titles of feudal proprietors whilst burghal titles were still exposed to grave risks. Cases⁽¹⁾ which came before the Court near to the time when the Burgh Registers Act of 1681 was passed, demonstrated how real the danger was of adopting a laissez faire attitude on the question of registration in the Burgh books, and the Court was moved to pass an Act of Sederunt on 22nd February, 1681. In that act the Lords ordered the magistrates of royal burghs to take caution from their town clerks that they insert all sasines and other writs

(1) Irvine & Cozen, 1681, M.12522. Halyburton, *supra*.

in their burgh books in the manner prescribed by the Act of 1617 for feudal deeds. It is to be noted that the Act of Sederunt did not state, in so many words, that writs not registered would be null, but this effect was to be achieved by the threat that the Lords would hold deeds not registered as latent and fraudulent, contrived for the purpose of deceiving bona fide purchasers; and, in addition, defaulting town clerks would be liable for their neglect to injured parties.

Following on the Act of Sederunt the Act of Parliament of 1681, c.11, was passed, bringing burgh rights into the scope of registration by statute. Unlike the Feudal Registers, however, the Burgh Registers were made to depend on the Magistrates and not on the Clerk Register.

Most of the burghs then in existence complied with the instructions of the Act to keep registers. In the 17th century burghs possessing the privilege of sending Commissioners to Parliament numbered 67⁽¹⁾, which number was reduced to 66 at the Union, by the excision of Cromarty from the Roll of Parliament on 23rd April, 1685 (A.P.S. VIII, 455). Of that number, Inveraray, Wick, Anstruther Easter and Kilrenny had

(1) C. S. Terry: Scottish Parliament, p.47.

neither Burgage tenure nor registers.⁽¹⁾ The burgh of Campbeltown, which was constituted a royal burgh in 1700, comes within the same category. Immediately prior to the Union, therefore, the number of royal burghs possessing the right to send Commissioners to Parliament, and also having Burgage tenure and registers, totalled 61.

The number of burghs affected by the provisions of the Burgh Registers (Scotland) Act 1926, however, is 65, made up of the number 61 referred to, plus the Burghs of Auchtermuchty, Earlsferry, Falkland and Newburgh (which were not included at the Union) and the Burgh of Paisley, but minus the Burgh of Dornoch, whose register was discontinued in 1809.⁽²⁾

Section IV. INTER-RELATION OF THE FEUDAL REGISTERS AND THE BURGH REGISTERS.

It is important to bear in mind that the Act of 1681 did not purpose the establishment of a separate register for real rights within burghs. It only mentioned sasines and other writs relating to tenements

(1) John Burns: Art. Burgage Tenure, Encyclo. Scots Law, Vol.II., p.437.

(2) Ibid.

within burgh royal or liberties thereof holding bur-
gage. Therein lay an important difference, and the
answer to the question whether a writ was recorded in
the proper register, therefore, depended on the nature
of the holding.

Unfortunately this was not always an easy matter
to decide, with the result that there was frequent
confusion of the registers. It was not even clear
whether feus of burgage subjects could be granted by
individual proprietors.

Another source of confusion in the Registers
arose through the difficulty of deciding whether a
property formed part of the old Royalty or not.

Reverting to the difficulty in registration
which was created by the granting of feus of burgage
subjects, it is well known that the alienation of the
common property of the burghs was not regarded with
marked favour in early times. The common lands of a
burgh, as may well be understood, were conveyed to
the magistrates as a trust for the benefit of all its
inhabitants. For several centuries this trust ap-
pears to have been respected, and prior to the 16th
century there is very little sign of the dilapidation
of the property of the burghs.⁽¹⁾ According to Hope
"a Burgh Royal could not feu out their common lands

(1) General Report of Municipal Corporations of 1835,
p.13.

without the express consent of the King and the Convention of Burghs", and he instances an Act of Parliament which had to be passed in 1695 to enable the Magistrates and Administrators of the Common Good to invest money in the famous Company trading with Africa and the Indies.⁽¹⁾

It appears that the burgh of Edinburgh was the initiator (in 1508) of a policy, soon to be followed by other burghs, which led to the disappearance of a great deal of burghal property.⁽²⁾ Without entering into details, it is well known that in some burghs the Administrators of the "Common Good" showed little compunction in parting with the property entrusted to their care.

As to the legality [^]by sale or feu of burghal lands, it has been well established that, under certain safeguards, designed to protect the interests of the community, the Magistrates of burghs were fully entitled to do so.⁽³⁾

*^ of an
alienation*

Granted that a feu of burgage subjects was given off by the magistrates, then, in accordance with the meaning of the Act of 1681, the deed of constitution

(1) Minor Practicks, 1734, p.322.

(2) Municipal Corporations' Report, supra. p.13.

(3) Ersk. 2. 4. 9; Dean & Mags. of Irvine, 1752, M.2522. Arbroath & Dickson, 1872, 10 M.630.

required to be recorded in the feudal register;⁽¹⁾ and where a subject was not held burgage, the fact of a grant containing a stipulation for services of a kind usually associated with burgage tenure did not alter its non-burghal character.⁽²⁾ A different view, however, was taken where land was held for a small feuduty, but as Bell remarked, it was not to be relied upon.⁽³⁾

Conversely, the incompatibility of burgage tenure with feuduty was established, and it was found incompetent to attach feuduties to a burgage⁽⁴⁾ holding. The subjects in such cases being held burgage, sasine required to be registered in the burgh books.⁽⁵⁾

When alienations of burgage property were made, there were many instances of attempts to get the benefits of both tenures.⁽⁶⁾ Regarding these border line cases, Bell's Editor wrote: "Sometimes there is a confounding

(1) Ersk. *ibid.* Bell's Principles, 10th Ed., par.846.
Duff's Feudal Conveyancing, sect.389(4).
Arbroath v Dickson, *supra*.

(2) Davie v Dennie, 2 June, 1814, F.C.; Lord Fife's Trustees, 25 May, 1842, 4 D.1245.

(3) Dickson v Lowther, 1823, 2 S.176; Bell's Principles, 10th Ed., par.847.

(4) Arbroath v Dickson, *supra*. John Burns, Art. op. cit., p.439.

(5) Burnet v Drummond, 1711; Forbes, 517.

(6) Edgar v Maxwell, 1743, 5 Br.Supp.730; Perth Mags. v Stewart, 1830, 9 S.225, 13 S.1100; Earl of Fife's Trs., *supra*; Donald's Trs. v Yeats, 1839, 1 D.1249; Dawson, 14 Nov. 1827, 6 S.19; 31 Mar. 1830, 4 W & S. app.81.

"of holdings, and it is doubtful whether the subject
 "is to be held in burgage or in feu, or whether the
 "titles are to be made up in the usual way or more
 "burgagio," and he continues, "the rule seems to be
 "that in dubio the tenure is to be held burgage with
 "a ground annual, the holdings of burgage and feu not
 "being inconsistent to this extent."⁽¹⁾

The results of recognising the validity of feus
 out of burgage subjects were twofold: the fees of
 superiority and property were registered in separate
 registers and separate searches in both registers
 could not be avoided. If there was no question as to
 the right of magistrates to give off feus, the pro-
 priety of individual burgesses doing likewise was
 doubtful. Opinion on the whole was decidedly against
 subinfeudation by private persons.⁽²⁾ But there was
 no clear authority for this opinion. A security in-
 feftment granted by a private person with a holding
de me was, indeed, held valid prior to 1874.⁽³⁾

Where the magistrates acquired additional pro-
 perty, which was not made burgage by another charter
 of erection, there was no difficulty in choosing the

(1) Bell's Principles, 10th Ed., par.846.

(2) Bankt. 2. 3. 68. Duff's Feudal Treatise, pp.51,
 509. Bell's Lectures on Conveyancing, 1st Ed.
 p.737. Hendry's Manual, 3rd Ed., p.359. Daw-
 son, supra, Mags. of Arbroath & Dickson, supra.

(3) Bennet & Sclanders, 1711, M.6895.

register. With regard to such property, the burgh was a private individual and therefore it was held under the tenure of the grant.⁽¹⁾

We have already referred to the difficulty of demarcating the boundaries of the old Royalties of burghs. Since the passing of the 1681 Act important burghs like Edinburgh, Glasgow, Dundee and Aberdeen have greatly extended their boundaries beyond the limits in their charters of erection, and it is now not always easy - in some cases almost impossible - to determine the precise limits of the old Royalties of those burghs. In consequence of this development, diversity of law exists in each burghal unit and the registration areas are difficult to demarcate. The choice of register, therefore, is frequently a case of guesswork, and prudent conveyancers solved and still continue to solve this problem by registering in both registers - indeed any other course would be unwise; but this, naturally, entails double registration and searching fees.

(1) Ersk. 2. 4. 9.

Section V. ASSIMILATION OF FORMS OF BURGAGE CON-
VEYANCING TO THOSE IN USE FOR FEU HOLDINGS,
AS LEADING TO DISCONTINUANCE OF THE BURGAGE
REGISTERS.

As we have already dwelt at considerable length on the subject of conveyancing reform and its relation to the registration of feudal writs, it should not be necessary to enlarge on the same theme in the case of burgage titles.

The simplification of the forms of burgage deeds and completion of titles to burgage rights are not dissociated from the factors which accelerated the reforms which took place in feudal conveyancing.

Viewing the history of conveyancing reform in the 19th century in retrospect, one cannot help noticing that every reform which was inaugurated in that period had, in so far as it impinged on burgage tenure, one purpose in view, namely, the breaking down of the barriers which separated burgage tenure from the other feudal tenures.

Shortly stated, the steps in the process of assimilation were as noted below, but first a word as to how a disponent feudalised his title to burgage subjects before 1845. Prior to that year, the disposition of a party infeft in burgage subjects

contained a procuratory of resignation as the only feudal clause. In form, this procuratory was a mandate to procurators to compear before the bailies of the burgh or any one of them and resign the lands into their hands, as in the hands of the Sovereign, the immediate superior thereof, for new infeftment to be granted to the disponee; whereupon the disponent or his procurator appeared on the ground of the subjects, accompanied by a bailie and by the town clerk, who officiated as notary, along with two witnesses. The warrant was then published by the town clerk, and the procurator thereupon made resignation by the symbol of staff and baton.⁽¹⁾ After that, the bailie delivered earth and stone and hasp and staple to the procurator for the disponee, who, in turn, took instruments in the hands of the notary, calling the attention of the witnesses to the fact.

In accord with the nature of the ceremony the Instrument which made a record of it was called an Instrument of Resignation and Sasine, and in conformity with the terms of the Act of 1567, c.34,⁽²⁾ this Instrument was authenticated by the town clerk, who on that account required to be a notary public. In passing it may be mentioned that the regulation

(1) Act of Sederunt, 11 Feb. 1708. Carnegie v Cruickshank's Creditors, 2 Dec. 1729, M.14,316.
Earl of Aberdeen v Duncan, 1742, M.14,316.

(2) Supra.

requiring the full registration of a document was, with respect to the insertion of the notary's docquet, somewhat loosely attended to. This tendency to slackness was corrected by the Act of 10 Geo. IV. c.19.

Reverting to the changes made by the Conveyancing Acts of the 19th century with regard to burgage tenure, the first to be noted is the Heritable Securities Act of 1845. The provision made by that Act for improved methods for transmitting and extinguishing heritable securities applied to heritable securities over subjects held burgage.

By the Infektment Act of 1845 the notary's docquet in the Instrument was dispensed with, and the delivery of symbols might be given within the council chamber of the burgh by delivery of a pen. It was still necessary, however, to record the Instrument of Sasine or of Cognition and Sasine within 60 days of its date (sec.7).

Between 1847 and 1868 we have first the Burgage Tenure Act of 1847 (10 & 11 Vict.c.49), the purpose of which was to effect the same improvements in burgage conveyancing as had been effected by the Lands Transference Act of the same year with respect to other heritages. Brief formulae were also substituted for the verbose clauses formerly in use. The ceremony of resignation was abolished and infektment

in burgage tenure assimilated to the mode of infeftment in ordinary feudal tenures introduced by the Infeftment Act of 1845 (sec.5), and the Instrument might be recorded at any time during the life of the party in whose favour it was expedite (sec.7).

The Heritable Securities for Debt Act of 1847, which among other reforms authorised the direct registration of a bond and disposition in security in lieu of infeftment, applied to Burgage as well as to Feu or Blench.

The Titles to Land Act of 1860 brought the process of unification of the system of heritable conveyancing a stage nearer consummation. Generally, this Act applied the provisions of the Titles Act of 1858 to lands held burgage. Thus, a party making up title to a burgage tenement might record his deed direct; or, if his title was granted for further purposes or objects, or embraced separate lands or separate interests in the same lands, he could either (a) record it alone, or (b) expedite and record a Notarial Instrument (sects.3,13,5 and 4).

All of the above enactments were incorporated in the Consolidation Act of 1868, which also permitted a Notarial Instrument to be expedite in every case where a party chose to resort to it (sec.17).

The mode of entering heirs to burgage lands was

also made uniform with the mode of entering heirs to other heritages. The right which the bailies of all royal burghs had acquired by immemorial usage to cognosce and enter heirs in burgage subjects without service by inquest or judicial sentence was exercised until the year 1860. Service and entry more burgi were left untouched by the Service of Heirs Act of 1847 (sec.26), but the Titles Act of 1860 changed all this. Under that Act this mode of entering heirs more burgi was rendered obsolete and the mode of entering heirs to burgage property was assimilated to the method used in entering heirs to the other feudal holdings. This change was ratified by the Consolidation Act of 1868 (sects.102 and 27).

Save in one or two instances, conveyancing legislation of the ¹⁹20th century had not interfered with the Burgh Registers. It contented itself with several enactments relating to the warrant of registration and the monopoly in the hands of the town clerks for preparing infestments in burghal lands.

Warrants of registration on conveyances of burghal lands were required by the Titles Act of 1860. The warrant in that Act, however, did not specify the register, but the one prescribed by the Consolidation Act required the register to be specified (sec.141). The section referred to made some discrimination

between burgage deeds and ordinary deeds. While it enacted that all deeds must have a warrant, previous to being presented for registration, its use was not extended to deeds and instruments which were formerly registered in the Burgh Register without it.

The type of burgage deeds comprised within this exception were Instruments of Sasine or Resignation and Sasine, Notarial Instruments, Bonds and Dispositions in Security, and Assignations thereof, etc.

The rights and privileges of town clerks had long stood in the way of the merging of both registers, and as long as these officials continued to enjoy the exclusive right of passing infeftment, the discontinuance of the Burgh Register was out of the question.

Happily these anachronisms were abolished in 1860, and all town clerks who were appointed to their office subsequent to 8th March, 1860, were deprived of a monopoly whose continuance was not in trend with modern ideas regarding freedom of contract. (Titles Act of 1860, sects.21 and 23; Consolidation Act of 1868, sects.151 and 153.)

As a result of the 25th section of the Conveyancing Act of 1874, it was made clear that a private person may grant a feu of burgage subjects. In detail the changes wrought by that Act are, so far as burgage

titles and burgage property are concerned, as follows:-

- (1) All distinctions between the two tenures, so far as these still existed in regard to forms of deeds and completion of titles, are abolished;
- (2) Any person may feu;
- (3) Titles of all feus granted prior to the Act are unchallengeable on the ground of their being feus of land held by burgage tenure, or that the titles thereto were recorded in the Burgh Register;⁽¹⁾
- (4) All writs affecting land held burgage prior to the commencement of the Act shall be recorded in the Burgh Register;
- (5) Feudal clauses in Burgh deeds are abolished (sec.26);
- (6) Every burgage deed prior to being presented for registration must have a warrant for registration (sec.33); and
- (7) Booking tenure is assimilated to feus on exactly the same footing as burgage tenure.

From these changes it will be seen that the only thing that remains of burgage tenure to remind conveyancers that it once existed is the Burgh Register. In

(1) McCutcheon v McWilliam, 1876, 3 R.565.

regard to that register the Act⁽¹⁾ had its continuance in view, while intending to clarify once for all the position with respect to the registration of writs relating to burgage lands feued out before or after 1st October, 1874; but in the opinion of some conveyancers it has solved one problem only to create another. With respect to the meaning of the first part of section 25, no dispute occurred and everyone agreed that the section infers that writs relating to burgage lands feued out before 1st October 1874 must be recorded in the ordinary register. A controversy had arisen, however, with regard to the interpretation of the second part of the section, which read "Writs affecting land which immediately prior to the commencement of this Act was held burgage shall be recorded in the burgh register of sasines". On the one hand it was contended that the feudal register is the correct one in which to register these writs.⁽²⁾ This view did not meet with general acceptance, but as the arguments by which it was supported were sufficiently cogent to induce some learned lawyers to advise the public to record in both registers,⁽³⁾ we

(1) Sect. 25.

(2) Mowbray's Analysis of the Act, p.47; Hendry's Styles (Mowbray's Edition) p.203.

(3) John Sturrock: Analysis of the Con. Act of 1874 and Amending Acts, p.92 et seq. Menzies Convey. pp.853-4. John C. Murray, Notary Public, 1890, p.189; and see Handbooks of Records, Millar & Bryce, 1885, pp.6 & 15.

give the grounds for it as summed up by Mr Sturrock:
 "The Act by this section assimilates the law of conveyancing in regard to the two kinds of tenure; but
 "as it was not the intention of the Act to abolish
 "the Burgh Register of Sasines, it was necessary to
 "enact the second paragraph to insure that the alteration in the law did not have this effect, and also
 "in order to make it clear that that register was to
 "be used as formerly for all writs affecting burgage
 "subjects which have not or should not be feued out,
 "while the feudal register should remain as formerly
 "the register applicable to all writs relating to burgage subjects feued out. This argument is coupled
 "with the view that the concluding lines of the first
 "paragraph show that the whole section is framed on
 "the assumption that the feudal register is the only
 "appropriate one for all burgage feus. In this connection the word 'writs' in the second paragraph is
 "read as if the first paragraph precluded the possibility of it having any reference to writs connected
 "with feu rights."

On the other hand, Begg⁽¹⁾, who took the opposite view, supporting himself on the authority of Bell⁽²⁾,

(1) Conveyancing Code, p.362, Note n.

(2) Bell's Lectures on Convey., 2nd Ed., pp.794, 1109.

maintained that "this provision is designed not merely to retain the burgh registers but also to afford an easy way to determine whether a writ should in future be recorded in the burgh register or in the county register. The date of the commencement of the Act is taken as the point of time at which the question is to be determined once for all with reference to each particular property This provision avoids the confusion that would have resulted had the selection of the register depended on whether the property continued to be held burgage or came to be feued out after the commencement of the Act. It also prevents the county registers gradually superseding the burgh registers as to the titles of the dominium utile of subjects in burgh, and the burgh registers remaining the appropriate registers for the titles of the dominium directum thereof."

Begg's view commanded by far the largest support, and it has been followed by later writers.⁽¹⁾

Assuming that Begg's view is correct, and also assuming that one may ignore the advice to record in both registers, overlapping and confusion of both registers is almost as prevalent as before the Act.

(1) Professor Morrison: Art. on Registration and Records, Encyclo. of Scots Law, Vol. XII. p.391.
 John Burns: Handbook on Conveyancing, 2nd Ed. pp.273-4.

Double registration to a very great extent is still unavoidable. For instance, transmissions after 1st October 1874 of feus of burgage subjects before that date, still require to be registered in the county register, and the titles to the superiority, in the burgh register; and, where a party acquires both fees, the Minute of Consolidation requires to be booked in both. Another drawback is the oscillation between both registers. Although the Act condoned the registration in the burgh register of titles to feus of burgh property given off before 1874, it is clearly implied that future transmissions of such feus not recorded in the county register will be inept. Again, the rule that feus of burgage subjects given off after 1874 require to be recorded in the burgh register must be treated with caution. It does not apply where a superior feu has been constituted before 1874.

As regards a property really undivided, yet held partly under both tenures, the Act could do nothing to mitigate the expense of double registration and double searching; and when a portion of such a property comes to be sold it will sometimes baffle the wisdom of a Solomon to know exactly what is the proper register. In addition to these difficulties, there are others arising out of the different notions

which different conveyancers entertained as to the meaning of section 25 of the Act, and as a result of which a progress of titles, as viewed from each register separately, appears very much like a ladder with several of its rungs missing.

Assuredly, the working of the Act served to convince most people that the grand design of the Registration Act of 1617 would only be completed when the Burgh Registers were abolished.

Section VI. DISCONTINUANCE OF THE BURGH REGISTERS.

The discontinuance of the Burgh Registers has been provided for by the Burgh Registers (Scotland) Act, 1926, and in the near future registration of all feudal tenures will be uniform throughout the country.

The Royal Burghs have not yielded their registers without a struggle. Prior to the passing of the Act in 1809⁽¹⁾ "for better regulating the Publick Records of Scotland", the records of the burgh court were a competent register for the registration of deeds and all other regular instruments "by which they were at once endowed with the force of judgments

(1) 49 Geo.III. c.42.

or decrees".⁽¹⁾ Arising out of that Act, the Burghs were deprived of many of their registers, though they retained their Sasine Registers, but even so, they were compelled to use only such books for those registers as were marked and issued by the Lord Clerk Register.⁽²⁾ In the light of subsequent events this enactment may be regarded as the first step towards the discontinuance of the burgh registers. Under that Act also the Lord Clerk Register was given power to present a summary complaint to the Court of Session against any clerk of a royal burgh on account of any neglect or malversation in the business of the records committed to his care (sect.xi.). It will be remembered that the Burgage Registers Act of 1681 gave the magistrates full control over their sasine registers without any interference from the Lord Clerk Register. In 1681, the Burghs may have been weakened by the decline of the Staple⁽³⁾ and the blow dealt them by the Statute of 1672, which communicated many of their trade privileges to the non-royal burghs, but they were still strong enough to resist any overtures for the supervision of their registers by the

(1) Report of Municipal Commissioners, *supra*, p.54.

(2) Sect.9.

(3) Matthijs P. Tooseboom: The Scottish Staple in the Netherlands, pp.234 et seq.

Lord Clerk Register, if any such had then been made. By 1809, however, though juridically they still retained many of the privileges which they were entitled to by their charters of erection, the royal burghs were completely subdued by the advance of commercial progress and the encroachments of the non-royal burghs and other trading corporations, so that for all practical purposes they were no longer the exclusive trading centres of the country. Hence any opposition which the burghs might have been able to put up against the proposals of the Act of 1809 would not carry the weight it might have done at one time. Nevertheless, it seems that they were determined not to let their registers go by default. Vested interests in the registers, not to speak of pride in their past, were sufficient guarantees that the burgesses would not willingly forego their privileges. It appears that in 1808⁽¹⁾ they used Article 24 of the Act of Union as an argument against any encroachment on their privileges with regard to the registers. That Article read, "That the records of Parliament and all "other records, rolls, and registers whatsoever "continue to be held as they are within Scot- "land and that they shall so remain in all time."

(1) Report re Bill for Records to Annual Convention of Royal Burghs, held on 23 April, 1808.

The facade of burghal power, which had already begun to crumble towards the end of the 17th century, if not earlier, was, following upon the Report of the Commissioners appointed in 1835 to enquire into the Municipal Corporations, finally demolished in 1846 (9 Vict. c.17). After 1846 the Burghs were, therefore, no longer in a position to put forward any claims for special treatment in any matter affecting the general welfare of the country. This factor was fully taken into account when changes in conveyancing law and practice were under consideration.

When the District Registers were abolished in 1868, the Burgh Registers were left intact, because it was thought impracticable to put too great a burden on the Register House. This attitude was shared by officials in the Register House. The lack of abridgments in the burgh registers was a severe handicap at that time. In some burghs, even Minute Books were wanting, though these were essential under the Act of 1681. With the exception of some of the larger burghs, indexes, such as were prepared in the Register House, were not to be found in the Burghs, simply because these were not required by that Act.

On those grounds and, among others, the vague descriptions in burgage titles, the Commissioners, Morton and Bannatyne⁽¹⁾, whose recommendations on the

(1) pp.32-33 of Commissioners' Report.

subject of registration carried great weight, pronounced against the merging of the burgh registers with the ordinary registers. Representatives of the burghs appeared before the Select Committee on the Writs Registration (Scotland) Bill of 1866, and they were, naturally, hostile to the abolition of their registers. Actually, a motion that the Barony and Regality of Glasgow have a register to itself was put before that Committee, and was rejected only by the casting vote of the Chairman. Indeed, other motions, e.g. that parliamentary burghs have a register and that the burgh registers should extend over parliamentary bounds of royal burghs, were also made in that Committee. These were also negatived, albeit by a larger majority.⁽¹⁾

After the passing of the Conveyancing Act of 1874, opinion swung round in favour of the abolition of the burgh registers and a provision to that effect was contained in the Registration Bill of 1893. Lord Low's Committee⁽²⁾ also recommended this step, and they expressed the belief that Morton and Bannatyne would have given it their blessing "had they lived to see the high state of skill in preparing summaries

(1) P.IX. of Committee's Report.

(2) Par.285 of Report.

"of writs relating to urban and rural subjects which
 "the practice and experience of the last quarter of a
 "century have developed in the Register House." The
 legal societies, however, were as yet divided on the
 proposed reform - a fact which tends to explain the
 non-success of any of the Bills of 1893, 1899, 1900,
 1901 and 1913 to bring the project any nearer to
 fruition.

With the passing of the Feudal Casualties Act of
 1914 it was no longer possible to point to any sub-
 stantial difference between lands held under burgage
 tenure and those under ordinary feudal tenure, and no
 argument remained with which to oppose the transfer
 of the burgh registers. The only real obstacle was
 the vested interests of town clerks. If their regis-
 ters were to be abolished, these officials quite
 naturally thought they had a claim to be treated in
 the same way as the District Keepers on the abolition
 of the provincial registers. Possibly the Treasury
 were not prepared to shoulder this responsibility,
 but by the happy expedient of bringing in the regis-
 ters gradually, a difficult problem was solved.

The Burgh Registers Act of 1926 provides that a
 burgh register shall be discontinued on the occurrence
 of a vacancy in the town-clerkship, or sooner, with
 consent of the town clerk (Part I.). It was

anticipated that in the case of the larger burghs, where the remuneration of the town clerk is not dependent on fees derived from registration, this step would not be delayed. This anticipation has been fulfilled. Altogether, of the total of 65 burgh registers scheduled in the Act, 21 have already been discontinued by the end of June 1937. The registers discontinued comprise Aberdeen, Auchtermuchty, Cullen, Dundee, Dysart, Edinburgh, Forfar, Forres, Glasgow, Inverbervie, Inverness, Kinghorn, Kirkcaldy, Linlithgow, Lochmaben, Nairn, New Galloway, Paisley, Queensferry, Renfrew and Wigtown.

The volumes and records of a burgh are to remain its own property; but as it is essential for Register House Officials to be able to refer to prior deeds for abridgment purposes, the Act provides that these documents, of date later than 1st January, 1870, are to be transmitted on the discontinuance of a burgh register to the keeper of the records. The latter is empowered to retain them for specified periods only, after which he must return them (Part II.(2)). This arrangement, while not completely satisfactory, is an improvement on the suggestion made by the Faculty of Procurators of Glasgow that burgh records for 20 years only be deposited in the Register House (Lord Low's Report, par.287).

CHAPTER 2.REGISTRATION OF LEASEHOLDS.

Until 10th August, 1857, a leasehold right was incapable of registration. Since that date leases of a certain type have been admitted to the benefits of registration on a voluntary basis, so that the Register as constituted to-day is compulsory for feudal rights only.

The distinction which has been made, for registration purposes, between these two classes of rights can only be properly appreciated when one bears in mind that there is a fundamental difference between them. Leases are not capable of infeftment. They are by their nature only personal contracts, and participate in the qualities of a real right only by possession, possession being to them what sasines are to alienations.⁽¹⁾ The quality of a real right as applied to leases was derived from statute.

From the terms of the Act 1449 c.6 (II. 35), which conferred the quality of a real right on leases, it is apparent that tacks had long been in use before

(1) Ersk. 2. 6, 23.

then, but only under the form of personal contracts, which were not binding on singular successors of the feudal proprietor. Those ancient tacks were drawn up in the form of the charter,⁽¹⁾ and sasine was sometimes resorted to, in order to make them real. The practice of passing sasines on leases is said to have come to an end with the passing of the Act of 1449.⁽²⁾

That Act was devised to benefit "puir people that labouris the ground" and secure them for the term of their tenancies against singular successors if certain conditions were fulfilled. As interpreted by the Court, these conditions were, that there was a lease in writing, containing a specific rent and a definite ish, on which possession followed. The stipulation as to possession had one great drawback. It meant that the tackholder, unlike a feudal proprietor, had not the means of obtaining credit on his leasehold possession, seeing he could not secure a creditor without putting him in his own place, a procedure which would only have resulted in defeating

(1) Robert Bell: Systems of the forms of deeds, 1799; II. 262-3.

(2) Sir Geo. Mackenzie: Observations on Statutes, 1687, p.37, but see L. Adv. v Fraser, 1758, M.15196, rev. 2, Pat.66 and remark of Lord Elchies in Jordanhill Credrs. v E. of Crawford, 5 Br. Supp. 797.

the object of a loan. Tenants made many attempts to overcome their handicap, but always unsuccessfully. Various devices at different times were adopted. In olden times, for instance, attempts were evidently made to supply the want of possession by recording leases in the Register of Reversions, and thus the question was raised whether registration could be equipollent with possession.⁽¹⁾ Later on, there were attempts to create securities over leases by heritable bonds.⁽²⁾ In more recent days we have numerous examples of efforts to secure a loan over leasehold by Sub-lease or Assignation, without possession. These were generally regarded as hazardous and received no support. In the present state of our law on this subject it would be very difficult, if not impossible, to invent a form of security over a leasehold subject, without possession, which would be fool-proof.⁽³⁾

That it was not the intention of the Act of 1449 to raise tacks to a level with titles of heritage was also made clear by the stipulation that a tack had to

(1) Dir1. and Sten. 2nd Ed. Tack, p.411. Hunter: Landlord and Tenant, 1st Ed., 356.

(2) Grieve & Grieve's Trs., 1790; Hume, 778.

(3) Bell's Principles, 10th Ed., par.1212.

bear a definite ish. A tack was to be differentiated from heritage by being terminable at a fixed date. Under the influence of this idea our early predecessors, when they desired to constitute a very long lease, expressed the term of its duration for a period which they regarded as equivalent to a liferent, with obligation for renewal from such period to period;⁽¹⁾ a practice which is retained at the present time. Afterwards, instances of leases granted to a tenant and his successors in perpetuity were evidently not uncommon, and when the validity of such leases was challenged by successors of the original feudal proprietor, the Court took the view that a proprietor may grant an obligation that will bind himself and his heirs for ever.⁽²⁾ The plea put forward in several cases that by sanctioning such leases the usefulness of the records was imperilled, did not avail. Singular successors were not bound to recognise leases in perpetuity; nor were they bound to accept leases where a definite term was named but with renewal from term to term.⁽³⁾ Evidently indefinite leases

(1) Walter Ross: Lectures, II. 489.

(2) Crichton & Stewart v Viscount of Ayr, 1631, M. 11182. Carruthers v Irvine, 1717, M.15195.

(3) Crichton & Stewart v Ayr, supra; Oswald v Robb, 1688, M.15194.

are good against singular successors only for the definite term expressed.⁽¹⁾ A singular successor who had taken a disposition of an estate with a conveyance of subaltern rights and leases under a declaration that his conveyance should not infer homologation of these rights, but that it should be lawful to him to impugn them on any ground competent in law, was held to be barred personali exceptione from making any objection to a lease, the ish of which was expressed to be for a period of 19 years, renewable every 19th year after the expiry of the first period.⁽²⁾ So far as leases for extravagant terms, such as 999 years or more, were concerned, there was an aversion at one time to regard them as binding on singular successors, as being virtually in perpetuity.⁽³⁾ That leases for 99 years were valid against singular successors was never doubted. A lease for 1400 years was sustained against the Crown on the ground that the ish was definite in terms of the Act of 1449;⁽⁴⁾ and the law seems now quite settled that leases of

(1) Scott v Straiton: 1771, M.15200; Affd. 3 Pat. 666. Campbell v McKinnon, 1867, 5 Macph. 636; Affd. 8 Macph. H.L. 40.

(2) Wight v Earl of Hopetoun, 1763, M.10461, 15199; and see Scott v Straiton, 1771, M.15200; Affd. 3 Pat. 666.

(3) Bankton: 2. 9. 6. Jordanhill Credrs. v Earl of Crawford, 1752, Elch. (Tack) No.18; 5 Br. Supp. 797.

(4) Lord Adv. v Fraser, supra.

extraordinary duration, so long as the terms of duration therein expressed are definite, are good against singular successors.⁽¹⁾

As has already been indicated in previous chapters, Scots lawyers have always retained a great affection for the Charter and Sasine. Nevertheless, once it was definitely established that the title of possession in leases for 99 years and even much longer was good against singular successors, leases became very common in practice, especially so, in the erection of villages. Their popularity was based on solid foundations. Leases enjoyed certain advantages over feuars. The expense of title, for one thing, was less, and a lease passed to an heir jure sanguinis, i.e. without any deed or legal process. The disadvantage under which a leaseholder laboured was, as stated, the difficulty of making his lease a fund for credit.

Until the middle of the 19th century, if we except the Act of 1617 (c.4), which made provision for the registration of long leases granted by ecclesiastics - a provision which proved to be a dead letter - no enactment relating to registration of leases was to be found in the Statute Book. An

(1) Rankine on Leases; (2nd Ed.) 135.

ancient type of lease evidently did require to be registered to be effective against singular successors. This was the special case of a Back-tack granted by a wadsetter and which was not engrossed in his infeftment.⁽¹⁾

The obstacle to the obtaining of credit on the security of leasehold rights was keenly felt at the beginning of the 19th century, particularly so by important concerns whose factories were built on properties held under lease. These concerns found that they were unable to raise money for capital improvements without putting their creditors in possession of their factories - a procedure which was obviously unthinkable. Occurrences of this nature brought the question of registration of leases in some form or another to the forefront. Professor George Bell⁽²⁾ was probably the earliest of our noted writers to urge this reform, and it was a subject of enquiry by the Law Commissioners of 1833.

The remedy which those Law Commissioners proposed was the institution of a separate register for leases to be kept either by the Sheriff-Clerk or the Keeper of the County Register of Sasines or Town

(1) Bankton: 2. 10. 23.

(2) Hunter, op. cit., 410.

Clerks.⁽¹⁾ They were disinclined to add expense to holders of leasehold rights, and they suggested that a brief entry in the record of the leading particulars of a deed might suffice for full transcription. Somewhat on those lines, a Bill was introduced in 1838 which proved abortive. Between the time of that Bill and the Registration of Leases Act of 1857 (20 and 21 Vict. c.26), no further steps were taken to promote any measure for the registration of leases. The passing of the Act of 1857 evoked a great deal of criticism and it was opposed by the Faculty of Advocates, who drafted a measure of their own,⁽²⁾ of which it was said in some quarters that it was superior to the measure put on the Statute Book.⁽³⁾

The Act of 1857 bears the mark of hurried draughtsmanship. Nevertheless, it has worked well in practice, and litigation arising therefrom has been remarkably little.

Under its provisions not all leases are entitled to the benefit of registration, and registration is voluntary. The requisites of a lease falling within the Act and entitled to the benefit of registration

(1) Report, p.xl.

(2) See Journal of Jurisprudence; I. 359.

(3) W. Guy: Registration of Leases; Jur. Rev. xx. 236.

are: (1) It must be probative (sect.1); (2) it must run for a period of not less than 31 years (sec.1), or contain an obligation to renew so as to endure for that period (sect.17); and (3), in the case of a lease executed after 10th August, 1857, it must set forth (a) the name of the lands of which the subjects of the lease form part, unless the lease is one of subjects which prior to the 1st October, 1874, were held burgage or is executed in terms of an obligation to renew contained in a lease dated prior to 10th August, 1857, and (b), except where the subjects leased consist of mines and minerals, set forth the extent of the lands let (which must not exceed 50 acres), unless the lease is one of subjects which were held burgage as before mentioned or is executed in terms of an obligation to renew, as before mentioned (sect.18).

A lease complying with these requisites fell to be recorded in the General Register of Sasines or in the Particular Register of Sasines for the district in which the heritage was situated, or in the Burgh Register in the case of a lease of subjects which prior to 12th August, 1857, were held by burgage tenure. The governing date for subjects held by burgage was extended to 1st October, 1874,⁽¹⁾ and, of

(1) Con. Act, 1874; Sect.25.

course, the Particular Registers have been abolished.

Until the abolition of the Particular Registers, leases had an advantage over feudal rights so far as searching was concerned, because assignments and assignations in security of a recorded lease were ordered to be registered in the same register in which the lease had already been recorded (sect.1). Section 19 of the Act merits attention. Under that section the Keeper of the Register is empowered to record any extract of a lease (registrable under the Act) which has been registered in the Books of Council and Session or in the Books of any Sheriff, Commissary or Burgh Court before 10th August, 1857. That enactment indicates that a lease which has been registered for preservation after the date mentioned would be disqualified from registration for publication. It is thought that the purpose of this discrimination was to make it safe for parties to rely upon unregistered titles completed by possession without examining the record.⁽¹⁾

Section 2 declares that leases registrable under the Act and valid and binding as in a question with the granters thereof, which shall have been validly recorded, shall by virtue of such registration be

(1) Art. on Registered Leasehold Titles, Journal of Jurisprudence, Vol.XXVI., 255-6.

effectual against singular successors; provided that, except for the purposes of the Act, it shall not be necessary to record any lease which would have been valid against a singular successor under the existing law. By this section, leaseholders sitting under leases which are not real against singular successors under the Act of 1449 (c.6) can by registering their leases gain important concessions. Thus, a lease on which no possession has followed, or one in which the term is expressed as perpetual or indefinite, or where the rent is elusory, can be made real against singular successors by the act of registration. Likewise with respect to leases of services and leases in security.⁽¹⁾

In theory, possession is still the badge of ownership even with regard to registered leases. All that the Act has done is to make publication equivalent to possession. Section 16 of the Act says the registration of all such leases, assignments, etc., shall complete the rights under the same to the effect of establishing a preference in virtue thereof, as effectively as if the grantee, or party in his right, had entered into actual possession of the subjects leased under such writs respectively at the date of

(1) Art. on Regn. of Leases Act of 1857: Journal of Juris., II. 63. Rankine on Leases, (2nd Ed.) 140.

registration thereof. Reading sections 2 and 16 together, it follows that where a registered lease comes into competition with an unregistered lease followed by possession, the question of preference will fall to be determined "according to the priority in time of the registration and of the first lawful possession".⁽¹⁾ Any other view would be based on the assumption that the 2nd paragraph of section 2 is to be regarded as pro non scripto. Registration, therefore, does not have the effect of putting leases on the same plane with feudal rights, for in the case of the latter, investigation is confined to the record. Section 12 of the Act is not an argument against the criterion of preference above mentioned. That section regulates the preference of recorded rights inter se. Unfortunately, section 12 is not entirely free from obscurity, but if section 2 is to mean what it says it means, then section 12 would seem to be capable of bearing one meaning only, namely, that all leases, not being real under the Act of 1449 c.6, executed after the passing of the Act of 1857 and actually recorded and deeds relating thereto, shall in a competition be preferred according to their dates of registration.

(1) Journal of Jurisprudence, II. pp.61,172,232,251; Rodger v Crawford, 1867, 6 M.24; Begg's Code, 454; Rankine, op. cit., 132.

As stated, the object of the Act was to enable lessees to utilise their leases as a fund for credit. This object is attained in section 4, which enacts that it shall be lawful for any party to assign his lease by an assignation in terms of the Act⁽¹⁾ which, when recorded, shall constitute a real security over the lease to the extent assigned. To enable this to be done, a leaseholder must have his own title of possession completed by registration. The law of accretion, therefore, does not apply to leases.

Provision is made in the Act for completion of title by an adjudger,⁽²⁾ a trustee on sequestrated estates⁽³⁾ and by a party, not being the original lessee or assignee.⁽⁴⁾

The case of completion of title of an heir raises one or two questions. Sections 7 and 8 introduce two methods by which an heir may make up title from an ancestor last vested in a long lease or assignation in security. Under section 7 he may obtain and record a Writ of Acknowledgment from the proprietor infeft in the lands and heritage, or from the person in absolute right of the lease, as the

(1) Sch. B.

(2) Sect.10.

(3) Sect.11, Sch. F.

(4) Sect.5, Sch. C.

case may be. Under section 8, an heir who has been served, as the Act says, by general service or special service to his author may complete title by recording a Notarial Instrument in the form of Schedule F. The mention of special service in section 8 is a blunder, because a special service at the date of the Act no longer included a general service to the whole heritage and a non feudal right cannot be taken up by a special service. Moreover, the reference to retours in Schedule F is not in order in respect of briefes of inquest having been superseded by petitions to the sheriff.

Although the Act has made provision for an heir making up title to his author, it must not be overlooked that at common law a lease vests in the heir without service and that mere apparency, therefore, in his case is a good title on which to possess. The provisions in the Act relative to the completion of title to an heir are merely part of the design for securing a continuous progress of titles to long leases, and the vesting of an heir is not postponed by either of sections 7 or 8 of the Act.⁽¹⁾

In connection with the making up of a title where in the series of transmissions an heir has

(1) McLaren: Wills and Succession; (3rd Ed.) 98-9.

intervened who has not availed himself of the machinery supplied by those two sections, it is thought that the narration in a Notarial Instrument or Notice of Title of the apparency will suffice as a link of title.⁽¹⁾

It had been a long standing complaint against the Act of 1857 that the forms applicable to the completion of title were less flexible than those in the case of feudal rights. The Conveyancing Act of 1924 has gone a long way towards remedying this grievance. Under section 24 of that Act, the provisions and forms prescribed for use in the case of feudal rights, irredeemable as well as redeemable, are, so far as applicable, adapted to leases and securities over leases which are registrable under the Act of 1857. A valuable economy to the public is also afforded under section 47 of the later Act. The terms of the earlier Act rendered it necessary to re-book a principal lease in its entirety as often as a title was being made up to any part of it. In future, once the principal lease has fully entered the register, it will be re-recorded by memorandum only.

(1) John C. Murray: Notary Public. (1st Ed.) p.297.

CHAPTER 3.REAL BURDENS.

Real burdens have always had the peculiarity that infestment of the debtor completed the title of the creditor,⁽¹⁾ though, like securities completed by infestment in favour of creditors, they constitute a security over the lands burdened.

In order to protect purchasers and creditors, a real burden must enter an infestment and enter the record. Formerly the expression of this rule was "that no real burden can be constituted on a feudal right which is not expressed in the investiture",⁽²⁾ and the meaning which the term 'investiture' bore in that connection was much canvassed. In *re Creditors of Smith*⁽³⁾ it was held that a general reference in a sasine to the burdens and conditions in a charter answered the requirement of the expression of the real burden in the investiture, on the ground that a charter is part of the investiture. That decision ignored the need of having a self-sufficient record

(1) Bell's Principles, (10th Ed.) par.923. Begg's Code, 367.

(2) Ersk. 2. 3. 51.

(3) 1737, M.10307.

and was contrary to the decisions given in earlier cases, finding that all the burdens on a grant must be particularly specified in the Instrument of Sasine.⁽¹⁾ Fortunately, the decision given in re Creditors of Smith, which was much criticised by Erskine, did not hinder the establishment of the rule as expressed at the head of this paragraph.⁽²⁾

Because a real burden was not constituted in favour of a creditor by infeftment in his own person, it differed also in the mode of its transmission, which was by assignation and not by warrant of infeftment.

The method of completing the transfer of a real burden was, until the passing of the Conveyancing Act of 1874, by intimation to the debtor, which took the place of publication in the register of sasines for feudal rights.⁽³⁾ In a competition between two assignees the criterion of preference was priority of intimation.⁽⁴⁾ Before 1874, transferees occasionally

(1) Campbell: 1706, M.10303; Lady Montbodo: 1711, M.10304; Duke of Argyll: 1730, M.10306.

(2) Erskine, *ibid.* Bell's Commentaries; (McLaren's Ed.) 726.

(3) Bell's Commentaries, *supra*; Miller & Brown, Hume, 540; 3 Ross L.C. 29. Baillie & Laidlaw, 1821, 1 Sh. 108.

(4) Stair, 4. 34. 7.

were known to register their assignments, but they added nothing to their title through this procedure.⁽¹⁾ However, registration of an assignment, rather than intimation, was a much safer method of transferring a real burden. Had the former method been in force prior to 1874, the unfortunate circumstances revealed in *re Miller v Brown*,⁽²⁾ where a debtor did not disclose an intimation from a transferee to a purchaser, with the result that the purchaser was saddled with a real burden which he was led to believe had already been discharged, would have been avoided.

The Conveyancing Act (sect. 30) made several provisions with regard to real burdens, one object of which, it may be said, was to prevent the mischief above referred to from recurring in the future.

On the state of the law with regard to real burdens, section 30 of the 1874 Act declares that, - it shall be lawful to record in the appropriate register of sasines any writing by which a real burden on land is assigned, conveyed or transferred, or is extinguished or restricted; no deed executed after the date of the Act, transferring a real burden, unless so recorded, shall be effectual in competition with

(1) Bell's Commentaries, *supra*. *Miller v Brown*, *supra*.

(2) *Supra*.

third parties, and its effect in a competition shall take place only from the date of its registration; registration shall render intimation unnecessary; and real burdens may be transferred, or extinguished or restricted, and titles thereto may be completed as nearly as may be in the same manner as in the case of heritable securities constituted or requiring to be constituted by infeftment as defined by the Consolidation Act of 1868, and the whole provisions, enactments, and forms of that Act and of the present Act relative to the transference and extinction or restriction of heritable securities constituted or requiring to be constituted by infeftment, and to the completion of titles thereto, as well as the provisions and enactments contained in section 117 of the Consolidation Act shall apply as nearly as may be to real burdens.

By these provisions it will be noticed that recording, although made competent, and in case of completion, indeed, necessary, is not made compulsory, and, in a question with the debtor intimation still remains an effectual mode of placing him in mala fide to pay over to anyone else and will also confer a sufficient title on the assignee to enable him to discharge the debt, providing the record is clear of a competing title.

With regard to the mode of completion of title to a real burden, the Act was not very precise. The design of the enactment appears to have been that after 1st October, 1874, real burdens should be transferred and extinguished and the titles thereto completed in exactly the same manner as heritable securities are dealt with in these respects by the Consolidation Act. But it was thought that it was impossible to determine whether the enactment intended that the deed constituting a real burden should be regarded as a recorded bond or as an unrecorded bond for the purpose of completion of title.⁽¹⁾ There was certainly a good case for upholding the view that the real burden might be regarded as a recorded bond in that connection, if only on the ground that, as under the law, the infestment of the debtor completed the creditor's right, there was no reason for worsening the position of the creditor by an Act, the scope of which was to assimilate real burdens to heritable securities. Dr Mowbray,⁽²⁾ however, advised against completing a title to a real burden for the first time under the Act by the simple registration of an assignation or deed of transfer, and he recommended

(1) James S. Sturrock: Analysis of the 1874 Act and amending Acts of 1879 and 1887, p.105.

(2) Analysis of the Conveyancing Act of 1874, p.52.

the use of a Notarial Instrument proceeding on the title of the debtor as its basis. Sturrock⁽¹⁾ rendered similar advice.

In subsequent cases of completion by Notarial Instrument, it was not necessary to produce to the Notary (as in the case of an ordinary heritable security) the deed constituting the real burden, provided the deeds or instruments were produced which assigned, conveyed or transferred the real burden, and which had been recorded in the Register of Sasines. The words of the Act, as they read, might be supposed as having excluded the production of a Notarial Instrument in this connection, for, strictly speaking, a Notarial Instrument does not "assign, convey or transfer" the real burden, but, reading the enactment as a whole, it is obvious that the Act intended to give the same effect to a recorded instrument following on an assignation as to a recorded assignation.

In view of the provisions of the Conveyancing Act of 1924,⁽²⁾ the points discussed in the last two paragraphs are now a matter of academic interest only.

(1) Supra.

(2) Sects.28, 31, Sch.K, note 4, and sec.4 (3),
Sch.B.3, note 4; Sect.2 (1)b.